89-747

No.

Supreme Court, U.S.
FILED
NOV 9 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CHICAGO CABLE COMMUNICATIONS,
SOUTH CHICAGO CABLE, INC., and
CABLE OF CHICAGO, INC.,

Petitioners,

v.

CHICAGO CABLE COMMISSION, and
CITY OF CHICAGO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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November 9, 1989

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QUESTION PRESENTED

Petitioners are licensed by the City of Chicago to operate cable television systems within the City. Chicago requires its "franchised" cable operators to provide a prescribed number of hours of "local origination" programming per week. The City subsequently construed this "local origination" requirement to mean that the content of such programming must be "geared to" Chicago, "produced in" the City of Chicago and must "feature local residents". Solely because that programming presented by petitioners over their distribution facilities was deemed not to satisfy this *post hoc* definition, the City, rejecting First Amendment defenses, imposed sanctions on petitioners.* On review, the lower courts, relying on *United States* v. *O'Brien*, 391 U.S. 367 (1968), sustained the City's action against constitutional challenge.

The question presented is:

> Whether the "less demanding" standard of First Amendment review set forth in *United States* v. *O'Brien*, is the appropriate test for justification of content-based regulations the facial purpose of which is directly to restrict the subject-matter and production of constitutionally protected communications distributed over cable television media?

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* "[Petitioners were] sanctioned . . . on the basis [that t]he programs used . . . to fulfill [their "local origination"] obligations were (1) produced by an affiliate company (2) in a suburban location and (3) were geared to the broad metropolitan area rather than the City [of Chicago] alone." *Chicago Cable Communications* v. *Chicago Cable Commission*, 678 F.Supp. 734, 742 (N.D. Ill. 1988), App. 35a.

LIST OF PARTIES

The proceedings below involved in the U.S. district court as plaintiffs, and in the Seventh Circuit court of appeals as plaintiff-appellants, (i) Chicago Cable Communications, (ii) South Chicago Cable, Inc., and (iii) Communications and Cable of Chicago, Inc. They are petitioners here (collectively referred to herein as "CCTV").

The defendants in the district court, and defendants-appellees in the court of appeals, were (i) Chicago Cable Commission, and (ii) City of Chicago, a municipal corporation. They are respondents here (sometimes collectively referred to herein as "City" or "Chicago").

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Petitioners,

v.

CHICAGO CABLE COMMISSION, and CITY OF CHICAGO,

Respondents.

JOINT PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, each licensed by the City of Chicago to operate separate cable television systems within the City, are Chicago Cable Communications, South Chicago Cable, Inc., and Communications and Cable of Chicago, Inc. Each is a subsidiary of Tele-Communications, Inc., a corporation the stock of which is publicly traded.

OPINIONS BELOW

The final (after rehearing) opinion of the U.S. Court of Appeals for the Seventh Circuit is reproduced in the annexed Petitioners' Appendix ("App.") at pp. 1a-20a and is reported at 879 F.2d 1540 (1989). The order of the court of appeals denying rehearing, en-

tered August 15, 1989, is reproduced in the Appendix at p. 21a. The Memorandum Opinion and Order of the United States District Court for the Northern Division of Illinois, Eastern Division, is reproduced in the Appendix at pp. 22a-49a, and is reported in 678 F.Supp. 734 (1988). The underlying agency decision is Resolution 54, February 10, 1987, of the Chicago Cable Commission, reproduced in the Appendix at pp. 56a-57a, and not otherwise reported.

JURISDICTION

The opinion and judgment of the court of appeals was entered July 19, 1989, and amended on denial of rehearing entered August 15, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

LAWS AND REGULATIONS INVOLVED

A. United States Constitution, Amendment [I.]:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Only the Speech and Press Clause is involved.

B. Also involved is "Section 18, Local Origination" of those Cable Television Franchise Agreements between petitioners and the City of Chicago which reads as follows:

> *Local Origination*
>
> During the term of this Agreement, Grantee, in cooperation with the other grantees op-

> erating within the City, shall provide for local origination as set forth in Exhibit G and Attachment G1 attached hereto and made a part hereof.

"Exhibit G" and "Attachment G1" referred to above are reproduced in the Appendix at pp. 50a-55a.[1]

STATEMENT OF THE CASE

For all purposes here, petitioners concur in those facts set forth in the district court opinion and adopted by the court of appeals.[2] This petition focuses solely upon the First Amendment challenge to sanctions imposed by the City of Chicago based upon the content and production of petitioners' programming, one of several issues raised before and rejected by the courts below.

Petitioners are franchised, operational cable television systems within the City of Chicago.[3] The

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[1] The pertinent portions of the Cable Television Franchise Agreement are included since they were adopted pursuant to an ordinance of the City of Chicago and thus may be construed as "ordinances" of the City of Chicago.

[2] *See Chicago Cable Communications* v. *Chicago Cable Commission*, 879 F.2d 1540, 1543 (7th Cir. 1989), App. 3a ("The parties largely agree with the statement of facts provided by the district court. . . . [and the Court] will not restate this summary in detail, but instead will focus on the [Cable] Commission's imposition of sanctions to determine whether a . . . First Amendment violation occurred") (footnotes omitted).

[3] Petitioners here are three separate, but affiliated (commonly controlled), entities, each of which is individually licensed by the City of Chicago pursuant to a nonexclusive "Franchise Agreement" to conduct cable-television services within discrete areas of the City. Consistent with the opinions below, petitioners are

respondent Chicago Cable Commission ("Commission"), an agency of the City of Chicago, regulates cable-television systems within the City.[4] CCTV operates the respective systems pursuant to "Franchise Agreements" let by the City.[5] Among other things, the subject "Franchise Agreement requires [petitioners] to produce and program a certain amount of 'local origination' (or 'L.O.') programming each week". 678 F.Supp. at 736, App. 23a.[6] The Franchise Agreement further provides:

> While public access [programming] is under the control of the Chicago Access Corporation (CAC), government access under the control of the City, and commercial or leased access under the control of third parties, local origination falls solely under the control of the cable operator and/or its contractors.

Attachment G1 to the Franchise Agreement, App. 52a.[7]

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collectively referred to herein as "Chicago Cable TV" or "CCTV". *Chicago Cable Communications* v. *Chicago Cable Commission*, 678 F.Supp. 734, 737 n.4 (N.D. Ill. 1988), App. 25a.

[4] Generally, the Commission functions pursuant to the Municipal Code of Chicago, ch. 113.1-1 to 113.1-60, "Chicago Cable Communications Ordinance", and is empowered, *inter alia*, to supervise the operation of cable television systems within the City of Chicago.

[5] For all purposes relevant here the terms of the Franchise Agreement respectively held by each of the petitioners are identical.

[6] Throughout the opinions below, the "Local Origination" requirement is referred to as "L.O." or "LO", and this form is followed here by petitioners.

[7] Under the terms of the subject Franchise Agreement, the

In November 1986, the "Commission inquired as to the source of some of CCTV's L.O. programming".[8] CCTV responded that a portion of its L.O. programming was obtained from an affiliated cable system serving Mt. Prospect, Illinois. 678 F.Supp. at 738, App. 27a. Following discussions between the City and CCTV, the Commission issued a "Notice of Violation against CCTV regarding its L.O. programming" asserting, *inter alia*, "CCTV has not demonstrated how their current programming is actually local origination in that it is actually locally produced (within the City of Chicago) . . . ". 678 F.Supp. at 739-40, App. 29a-30a (footnote omitted).

In response to this Notice, CCTV again acknowledged that some of its programming "was acquired from their affiliated . . . companies in the surrounding suburban area" comprising "selected shows from the pool of available . . . programming it believed would be of interest to its customers in Chicago". *Id.* at 740, App. 32a (footnote omitted). Thereafter, the Commission, relying upon the statement of one of its

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cable operator is required to make a system channel available for use by the City of Chicago ("government access"), a channel for use by the public ("public access") and channels to be leased for use by other persons ("leased access"). *See generally* 47 U.S.C. § 531, "Cable Channels for Public, Educational, or Governmental Use"; and 47 U.S.C. § 532, "Cable Channels for Commercial Use". All such channels have been made available in accordance with the Franchise and such requirement is not at issue here. *Compare, e.g., Preferred Communications, Inc.* v. *City of Los Angeles*, 754 F.2d 1396, 1401-02 n.4 (9th Cir. 1985), *modified on remand*, 476 U.S. 488 (1986).

[8] It is *not* the *amount* of L.O. programming distributed over CCTV's cable-lines that is here at issue, but rather the subject-matter and source of such programs.

staff employees who contemporaneously had "formulated a formal definition of L.O. [*viz.*,] 'programming . . . which is developed by an individual cable television system specifically for the community it serves' ", *id.*, found CCTV to be in violation of this *post hoc* definition because its "programming had not been produced or telecasted featuring local residents", 678 F.Supp. at 740, App. 32a.[9] More particularly, the Commission found that CCTV's L.O. programming—

> " 'is acquired through . . . affiliated TCI companies in the surrounding Chicagoland area' [and that] the subjects of the programming are, for the most part, geared to the broad City-suburban Chicagoland areas rather than the communities that CCTV/TCI serves".

678 F.Supp. at 741, App. 33a (quoting the Commission).[10] The district court held that the foregoing "finding was the basis of the Commission's ruling that CCTV was in violation of its L.O. obligations". *Id.*

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[9] *See also* 678 F.Supp. at 740-41, App. 22a ("Ms. Minor [of the Commission's staff], responding to questions [from the Commission] regarding the source of CCTV's programming and the subjects of that programming, stated that CCTV 'ha[s] utilized Chicago personalities, people connected with Chicago institutions, but Chicagowide, like Roosevelt University or Northern Trust Bank; but not necessarily community residents themselves' "). The term "local origination programming" had previously not been defined by the City.

[10] "The three affiliated [petitioners] which comprise 'Chicago Cable TV' are subsidiaries of . . . Telecommunications, Inc.", sometimes referred to by the courts below as "TCI". 678 F.Supp. at 737 n.4, App. 25a.

CCTV had urged that the City actions at issue "really were attempts to regulate the content of their L.O. programming, and that such regulation is impermissible under the First Amendment". 678 F.Supp. at 741, App. 34a. "After long debate and arguments . . . the Commission . . . assessed fines amounting to $60,750 ($750 per day) for 27 days . . . ", and CCTV instituted action in the U.S. district court "seek[ing] restitution of the $60,750 fine levied by the Commission". 678 F.Supp. at 742, App. 34a-35a.[11]

The district court found:

> The Commission sanctioned CCTV on the basis of three findings: The programs used by CCTV to fulfill its L.O. obligations were (1) produced by an affiliate company (2) in a suburban location and (3) were geared to the broad metropolitan area rather than the City alone.

678 F.Supp. at 742, App. 35a. Discussing the "sufficiency of the evidence" before the Commission, the district court determined that while, for example, "the show 'Illinois Reads' presents authors from throughout the State of Illinois [which] may be of interest to some Chicago cable customers, it clearly is not focused on Chicago". *Id.* (footnote omitted), App. 35a-36a. On these bases the district court concluded:

> [There] is enough evidence to support the Commission's findings. The tougher question is whether the Commission may legally impose the fines.

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[11] Jurisdiction in the district court was invoked by CCTV pursuant to 28 U.S.C. § 1331.

Id., App. 36a. The court then held that "the Commission's interpretation of the 'local origination' requirement is a reasonable one and we see no error in applying it". 678 F.Supp. at 743, App. 37a.[12]

Turning to the "tougher question", the First Amendment challenge mounted by CCTV, the district court first made a series of observations:

> • CCTV argues that the City's examination of the subject matter which CCTV, in the exercise of its editorial discretion, chose as its L.O. programming constituted impermissible content regulation.
>
> • The Supreme Court has not yet determined the appropriate standard for review for a First Amendment challenge of government regulation of cable television.
>
> • The lower courts have reached varying results in determining the degree of First Amendment protection to be accorded cable television operators. Some courts have held that cable broadcasting is very different from newspaper publishing where very little government regulation is constitutionally permissible. . . . Other courts

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[12] *See also* 678 F.Supp. at 746, App. 45a ("As we held earlier . . . , the Commission's definition of 'local origination' was a reasonable one. We thus interpret the Franchise Agreement as requiring L.O. programming geared to the specific community served by CCTV, or to the City of Chicago rather than the metropolitan area."). Thus the court affirms not only the City's authority to scrutinize petitioners' programming but also to pass upon its sufficiency in the context of necessarily subjective criteria.

> have determined that cable television is quite distinct from the broadcast media, where substantially more government regulation is constitutionally permissible.

678 F.Supp. at 744 (citations omitted), App. 39a-40a.

Without identifying any "noncommunicative conduct" affected by the City's L.O. regulation or discussing whether the restrictions placed on CCTV's programming discretion occur directly or merely "incidentally", the district court "conclude[d] that the appropriate framework for analysis in this case is provided by *United States* v. *O'Brien*". 678 F.Supp. at 745, App. 41a. In applying the *O'Brien* formula, and articulating the requisite "substantial governmental interests", the court found:

> The important qualities embodied in the term "localism" (community pride, cultural diversity, etc.) may not be furthered enough simply by the availability of local broadcast stations for retransmission over cable systems, but may require original cable programming specifically concerning the locality and directed at that locality's residents. The Commission's L.O. requirement helps foster those interests by insisting that those cable companies operating within the City of Chicago produce their L.O. programming within the City of Chicago and designed specifically for City residents.

678 F.Supp. at 745, App. 43a. The district court then held:

> "The first requirement [of *O'Brien*], that the government possess the power to regulate

> cable television, is satisfied. The cable television medium has not historically been insulated from regulation, as has the newspaper industry. . . . The third requirement [of *O'Brien*], that the governmental regulation be unrelated to the suppression of free speech, is also satisfied. . . . The Commission merely wants CCTV's L.O. programming to concern Chicago, and only Chicago".

678 F.Supp. at 745 n.14 (citations omitted), App. 41a-42a. Regarding that "final element of the *O'Brien* test . . . that the government regulation be an incidental restriction no greater than is essential to the furtherance of that interest", the court found only that "this element is satisfied". 678 F.Supp. at 746, App. 43a.[13]

Based solely on an *O'Brien* analysis of the recited facts, the district court rejected the First Amendment "objections" of CCTV, affirmed the sanctions imposed by the Commission and entered "summary judgment" for defendants, the City of Chicago and the Chicago Cable Commission. 678 F.Supp. at 748, App. 49a.

A panel of the Seventh Circuit court of appeals, stating that it will be "guided by the district court's factual findings", 879 F.2d at 1543, App. 3a, unanimously affirmed the district court decision on all

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[13] Counteracting any suggestion of an implied finding that the restriction on speech is "incidental", the district court observed: "Contrary to CCTV's assertion, this rule does not divest CCTV of programming control; it merely places a minor restriction on the exercise of that control." 678 F.Supp. at 746, App. 43a. *See infra* nn.15,19.

counts. 879 F.2d at 1547-1551, App. 12a-20a. The court of appeals noted that CCTV's claim that the "L.O. programming [requirements] constituted impermissible content regulation", raises "a novel question, for the Supreme Court has yet to determine the applicable standard for review of a challenge to a municipal regulation of cable television". 879 F.2d at 1547-48, App. 12a-13a. Recognizing that "CCTV's scheduling plainly implicates First Amendment interests, for cable operators exercise 'a significant amount of editorial discretion regarding what their programming will include' " (quoting *City of Los Angeles* v. *Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986)) and recounting the multiplicity of views expressed by other lower courts on the question, 879 F.2d at 1548, App. 14a, the Seventh Circuit likewise held that *O'Brien* provided the appropriate standard by which the City's L.O. regulation must constitutionally be tested.[14]

Applying *O'Brien* to these findings, the court of appeals, virtually as a reproduction of the district court opinion, found that the City's mandate for " 'original cable programming specifically concerning the locality and directed at that locality's residents. . . . helps foster those [legitimate] interests' " (quoting the district court), and thus qualifies constitutionally as "an important or substantial interest". 879 F.2d at 1549-50, App. 17a. The appeals court added:

> An additional interest fostered by the [City's] LO requirement is the provision of jobs for

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[14] "As other courts have held, *O'Brien* is an appropriate standard-bearer for dealing with questions of local regulation of cable television". 879 F.2d at 1548, App. 15a.

> residents of Chicago. Production of programming in the City provides career opportunities as well as potential internships for students studying communications at local schools. All of the above objectives of the LO rules are important and substantial concerns of the City, thereby satisfying . . . *O'Brien*.

879 F.2d at 1550, App. 17a. Concluding its affirmance of the district court decision, the Seventh Circuit stated:

> The City is not seeking a dominant interest in CCTV's cable programming, nor even a substantial interest, but simply a few hours a week. . . . The limited restriction at issue is really no greater than essential to further substantial City interests".

879 F.2d at 1550-51, App. 19a.[15]

In upholding Chicago's "L.O. programming" regulation, the courts below squarely rest their respective First Amendment judgments on itemized "substantial public benefits" that are projected to accrue from the City's direct, content-based regulation of petitioners' programming distributed via cable-television media. Neither court articulates any finding as to whether

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[15] Unless the lower courts define "incidental" to mean "minor", 678 F.Supp. at 746, App. 43a, or "minimal", 879 F.2d at 1551, App. 19a, neither discusses *O'Brien*'s threshold requirement that the "noncommunicative" regulation under examination impose merely an "incidental restriction on alleged First Amendment freedoms". *O'Brien*, 391 U.S. at 376. *See* Webster's *Third New International Dictionary, Unabridged* (1976) (defining "incidental" as "subordinate, nonessential, or attendant in position or calculation . . . ").

the L.O. regulation is "communicative" or "noncommunicative" in scope or whether the restriction impacts "directly" or only "incidentally" upon CCTV's speech freedoms. The conclusion reached by each court, under a purported *O'Brien* analysis, is that the projected "benefits" to be derived from Chicago's facially restrictive regulation of speech sufficiently outweigh—and thus "justify"—the acknowledged (but "minor") abridgment on freedoms protected by the First Amendment.

REASONS FOR GRANTING THE WRIT

1. *O'Brien* Is Inapposite to First Amendment Review of Those Content-Based Regulations Here at Issue

This petition raises a First Amendment question of fundamental importance: Whether the regulation of communications media that is acknowledged to impinge directly upon the freedom of "speech" and "press" may constitutionally be justified provided the restriction is shown, *on balance*, to further a "substantial governmental interest"? Not only is the issue of great moment to the relationships between local governments and the more than 9,000 franchised cable-television systems operating in over 24,000 communities nationwide, it has potentially broad application to all communications media in the context of government's authority to enforce regulations designed to control content or otherwise to limit the exercise of speech liberties.

CCTV's position is that (i) the interest-balancing standard of First Amendment review established by the Court in *United States* v. *O'Brien* is inapposite to content-based regulations which facially restrict the free exercise of conventionally accepted speech free-

doms;[16] and (ii) use by the courts below of *O'Brien*'s "less demanding" balancing formula to justify Chicago's subject-matter regulation of petitioners' programming conflicts not only with *O'Brien* but with other controlling opinions of the Court as well. Here, the courts below, without discussion, *assume* that Chicago's direct, "communicative" supervision of petitioners' programming"is within the constitutional power of the" City thus overlooking *O'Brien*'s threshold criterion. *O'Brien*, 391 U.S. at 377 ("a [noncommunicative] regulation [may be] sufficiently justified if it [facially] is within the constitutional power of the Government").[17] *See also, infra*, nn.19-21.

The function of *O'Brien* is not to remove the constraint or to disarm the protections of the First Amendment, but rather to evaluate certain forms of "conduct" where the exercise of speech rights are

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[16] *United States* v. *O'Brien*, 391 U.S. 367, 375 (1968). ("We note at the outset that the [draft card law] plainly does not abridge free speech on its face and we do not understand O'Brien to argue otherwise. . . . A law prohibiting destruction of Selective Service certificates no more abridges free speech on its face than a motor vehicle law prohibiting the destruction of drivers' licenses, or a tax law prohibiting the destruction of books and records"). *Id.* at 381-82 (the draft-card law is "limited to the noncommunicative aspect of O'Brien's conduct. . . . For this noncommunicative impact of his conduct, and for nothing else, he was convicted"). *Id.* at 376 ("when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest *in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.*" (emphasis supplied)).

[17] Neither lower court addresses the bedrock principle that the First Amendment "is a restraint on government action". *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 114 (1973).

"alleged" to be restricted by enforcement of presumptively legitimate, "noncommunicative" regulations. And where the "noncommunicative" regulation of "conduct" may be shown "incidentally" to limit the asserted speech freedom, government must then reasonably demonstrate that the challenged restriction "is no greater than is essential" to furtherance of "an important or substantial governmental interest". *O'Brien*, 391 U.S. at 377. While the command of the First Amendment is itself a strong barrier against *frontal* abridgment of the protected freedoms, the purpose of *O'Brien* is to safeguard these vital liberties from the potential of back-door erosion. *O'Brien* thus *expands* the protection of the First Amendment to accommodate consideration of more than just conventionally accepted speech (*e.g.*, " 'communication of ideas by conduct' ", *id.* at 376), the purpose being to insulate the constitutionally guaranteed freedom from even those unnecessary abuses that may "incidentally" arise.[18]

Here, the aim/effect of Chicago's L.O. requirement is "communicative" regulation. The courts below acknowledge that the City's L.O. regulation *directly* limits CCTV's First Amendment freedoms. The appeals court sees the restriction as only "a few hours a week" which it characterizes as "limited", 879 F.2d at 1550-51, App. 19a; and the district court finds, for example, that it "merely places a minor restriction on the exercise of [programming] control", 678

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[18] That the *O'Brien* standard of review is frequently and aptly characterized by the Court as "less demanding" is *only* because its "interest-balancing" test is inapposite to examination of those regulations that frontally or facially restrict the exercise of First Amendment prerogatives.

F.Supp. at 746, App. 43a. There accordingly is nothing oblique or "incidental" in the manner in which the L.O. regulation impacts upon CCTV's speech freedoms.[19] To the contrary, Chicago's intention, albeit for a "public purpose", is to restrict petitioners' programming and programming judgments.[20]

As misused below by the Seventh Circuit, *O'Brien* becomes a vehicle to justify "frontal" diminution of constitutionally guaranteed freedoms and thereby to circumvent the First Amendment. In contrast to that "noncommunicative", facially legitimate "draft card" law at issue in *O'Brien*, the City's "L.O. regulation" (i) intrudes directly to restrict CCTV's editorial discretion,[21] (ii) is aimed solely at speech content,

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[19] *See, e.g., City of Los Angeles* v. *Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986) ("[T]hrough original programming or by exercising editorial discretion over which stations or programs to include in its repertoire, [a cable operator] seeks to communicate messages on a wide variety of topics and in a wide variety of formats. We recently noted that cable operators exercise 'a significant amount of editorial discretion regarding what their programming will include' " (quoting *F.C.C.* v. *Midwest Video Corp.*, 440 U.S. 689, 707 (1979))).

[20] According to the courts below, those "substantial benefits" projected to result from City-imposed controls on petitioners' programming discretion (*e.g.*, "potential internships for students studying . . . at local schools", 879 F.2d at 1550, App. 17a) more than adequately offset the protections of the First Amendment and thus "justify" the acknowledged abridgment of CCTV's speech freedoms.

[21] *Compare Miami Herald Pub. Co.* v. *Tornillo*, 418 U.S. 241, 258 ("The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper . . . —whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated

(iii) consciously discriminates between "locally produced" programming and that produced in the "suburbs", (iv) distinguishes substantively between programming "geared to the City of Chicago" and that officially judged to have broader appeal, (v) pertains only to the *communicative aspects* of cable-television media, and (vi) punishes CCTV solely on the basis of its speech. Examined in its most favorable light, Chicago's content-based regulation, "communicative" in purpose and speech-restrictive in application, presumptively conflicts with the First Amendment.

In this case, the lower courts impermissibly confuse the "compelling governmental interest" test, as applicable to examination of a "content-based restriction on speech", *e.g.*, *Boos* v. *Barry*, 108 S.Ct. 1157, 1162 (1989),[22] with that "less demanding" test of *O'Brien* which, by its terms, is reserved for review of "non-communicative" regulations that are alleged to re-

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how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time") *with* 879 F.2d at 1550-51, App. 19a ("The City [of Chicago] is not seeking a dominant interest in CCTV's cable programming . . . but simply a few hours a week"). Both the trial and appeals courts below essentially *hold* that because certain aspects of cable television operation are unquestionably subject to local supervision, it therefore follows that a cable operator's programming and editorial discretion are fair game for regulation.

[22] *See also Sable Communications* v. *F.C.C.*, 109 S.Ct. 2829, 2836 (1989) ("[G]overnment may, however, regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further that articulated interest"). The opinions below do not apply, or even consider, the "compelling interest" test. *See infra* n.29.

strict "incidentally" the exercise of "speech" freedoms.[23] By so interchanging these well established, decisionally distinctive standards of review, the lower courts erroneously discount the protection constitutionally afforded speech and press and thereby reduce the command of the First Amendment to little more than an advisory.[24]

However valid may be the conclusions that Chicago's regulation of CCTV's "programming" decisions "merely places a minor restriction on the exercise of that control", 678 F.Supp. at 746, App. 43a, or that the intrusion is "sufficiently modest", 879 F.2d at 1551, App. 19a, or even that the restriction may result in "further[ing] substantial City interests", *id.*, such findings, alone or in concert, do not serve to bring these facts into the sphere of an *O'Brien* "balancing" evaluation.[25] To the contrary, the content-

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[23] *See, e.g., Texas* v. *Johnson*, 109 S.Ct. 2533, 2538 (1989) ("If the State's regulation is not related to expression, then the less stringent standard we announced in *United States* v. *O'Brien* for regulation of noncommunicative conduct controls"). Orders sanctioning petitioners on the basis of the *origin* and *subject-matter* of their programming not only "relate to expression", they are intrinsically "communicative".

[24] *See, e.g., Houchins* v. *KQED, Inc.*, 438 U.S. 1, 13 (1978) (Courts "must not confuse what is 'good', 'desirable', or 'expedient' with what is constitutionally commanded by the First Amendment. To do so is to trivialize constitutional adjudication".)

[25] Imagine the vitality that Mr. O'Brien's defense would have taken on had the Government there acknowledged, or the Court determined, that an objective of that law banning destruction of draft cards was to restrict, to any degree, the exercise of speech liberties. *See O'Brien*, 391 U.S. at 375 ("the [draft-card law] plainly does not abridge free speech on its face, and we

based regulation of the City of Chicago, because it is "communicative" in scope and because it, *by design*, limits CCTV's exercise of editorial discretion, forecloses assessment under the "less demanding" *O'Brien* standard.[26]

In the opinion of the lower courts here, review of local regulation of cable-television media, whatever the targeted subject-matter ("communicative" or "noncommunicative") and regardless of how it may impact on the protected speech freedoms ("directly" or "incidentally"), requires only a simple exercise in weighing the abridgment *vis-a-vis* government's asserted public-interest objectives.[27] And where the balance of the "*O'Brien*" scales may be perceived to tip in favor of the City's asserted "interests", it is, according to the courts below, the First Amendment

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do not understand O'Brien to argue otherwise"). *Id.* at 381-82 ("the governmental interest [was] limited to the noncommunicative aspect of O'Brien's conduct"). *Compare, e.g.*, the finding below of the court of appeals: "The limited [speech] restriction at issue is really no greater than essential to further substantial City interests." 879 F.2d at 1551, App. 19a. *See also* 678 F.Supp. at 745, App. 43a.

[26] *Compare, e.g., Thomas* v. *Collins*, 323 U.S. 516, 545-46 (1945) (Jackson, J., concurring) ("The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech and religion. . . . This liberty was not protected because the forefathers expected its use would always be agreeable to those in authority or that its exercise always would be wise, temperate or useful to society [but] because they knew of no other way by which free men could conduct representative democracy.").

[27] *E.g.*, 879 F.2d at 1548, App. 15a ("*O'Brien* is an appropriate standard-bearer for dealing with questions of local regulation of cable television").

that must give way.[28] This not only undermines the constraint and protections of the First Amendment, it constitutes an unprecedented departure from consistent opinions of this Court on a matter of fundamental constitutional law.[29]

"In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue. . . . Such power in government to channel the expression of views is unacceptable under the First Amendment". *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 784-85 (1978) (citing *Police Dept. of Chicago* v. *Mosley*, 408 U.S. 92, 96 (1972)). *See also Consolidated Edison Co. of N.Y.* v. *Public Service Comm'n*, 447 U.S. 530, 536 (1980) ("Governmental action that regulates speech on the basis of subject matter' " slip[s] from the neutrality of time, place, and circumstances into a concern about content." ' ") (quoting *Police Dept.*

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[28] *Compare, e.g., Metromedia, Inc.* v. *San Diego*, 453 U.S. 490, 502 (1981) ("[T]he government has legitimate interests in controlling the noncommunicative aspects of the medium . . . , but the First and Fourteenth Amendments foreclose a similar interest in controlling the communicative aspects").

[29] Observing that "burdens [on speech] are not invalid just because there might be some less burdensome alternatives", 879 F.2d at 1550, App. 18a, the court of appeals, citing *United States* v. *Albertini*, 472 U.S. 675, 689 (1985), discloses its fundamental error in applying below that "less demanding" test reserved for examination of "noncommunicative" regulations. *Albertini* is foremost a "conduct" case involving "alleged" restrictions on First Amendment freedoms arising "incidentally" from enforcement of "noncommunicative" "trespass" laws. *Compare* the "least restrictive" requirement of *Sable Communications*, *supra*, applicable to constitutional review of "communicative" regulations.

of Chicago v. *Mosley*, 408 U.S. 92, 99 (1972) (quoting Kalven, *The Concept of the Public Forum: Cox* v. *Louisiana*, 1965 Sup. Ct. Rev. 1, 29)); *Widmar* v. *Vincent*, 454 U.S. 263, 276 (1981) ("Our cases have required the most exacting scrutiny in cases in which a State undertakes to regulate speech on the basis of its content").[30]

This Court recently had occasion to consider in a First Amendment context the regulation of cable television within the framework of "franchising" by local governmental authority, including principally market-entry factors.[31] *Preferred Communications* presented the question of the power of a municipality to require a prospective cable operator to obtain, as a condition precedent, a municipal authorization permitting construction of a cable-distribution system within the community. More particularly, *Preferred* raised issues relating to the nature of such "franchising" authority and the extent to which local governments might condition entry upon and permanent use of public rights-of-way by a cable operator. Finding there that cable television operations "plainly implicate First Amendment interests", 476 U.S. at 494, the Court, citing *O'Brien*, further noted that "where speech, and conduct are joined in a single course of

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[30] *Compare, e.g.*, the finding by the district court in the instant case, 678 F.Supp. at 742, App. 35a ("The Commission sanctioned CCTV [because t]he programs used by [it] were (1) produced by an affiliate company (2) in a suburban location and (3) were geared to the broad metropolitan area rather than the City alone").

[31] *City of Los Angeles* v. *Preferred Communications, Inc.*, 476 U.S. 488, (1986).

action, the First Amendment values must be balanced against competing societal interests", 476 U.S. at 495.

Because those "franchise" provisions before it in *Preferred* governed far more than just communicative activity, also regulating the physical establishment and maintenance of electronic-transmission facilities over and under public property (*i.e.*, "noncommunicative conduct"), the Court remanded that case for a fully developed record stating:

> We think that we may know more than we know now about . . . the present uses of the public utility poles and rights-of-way and how [the cable operator] proposes to install and maintain its facilities on them.

Preferred Communications, 476 U.S. at 495.[32] Thus *O'Brien* will accordingly play its appropriate role in fashioning the parameters of permissible local-government control over market-entry and installation of cable television systems—even though the result may be to "incidentally" restrict the free exercise of speech freedoms.[33]

The instant case, however, raises a First Amendment question constitutionally distinct from that pre-

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[32] *See also id.* at 496 (Blackmun, J., concurring) (*Preferred* "leaves open the question of the proper standard for judging First Amendment challenges to a municipality's restriction of access to cable facilities").

[33] While the *Preferred*-type issue has yet to be definitively resolved by the Court, and is one in a state of uncertainty in the lower courts, a number of the lower courts, including the courts below, apparently read *Preferred* as implying an *O'Brien* standard for *all* cable/First Amendment regulatory questions. *See, e.g.*, 678 F.Supp. at 744, App. 40a-41a; and section 2, *infra*.

sented by *Preferred*. Chicago's "L.O. programming" regulation, in bright contrast, involves *only* governmental restrictions on the *communicative aspects* of cable-television media. *Compare Qunicy Cable TV, Inc.* v. *F.C.C.*, 768 F.2d 1434, 1449 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986):

> The potential for disruption in stringing coaxial cable above city streets may well warrant some governmental regulation of the process of installing and maintaining the cable system. But hardly does it follow that such regulation could extend to controlling the nature of the programming that is conveyed over the system.

The regulations *sub judice* actually comprehend artistic judgments by local officials to determine whether a particular program may be "geared to the broad metropolitan area [or] rather [to] the City alone". 678 F.Supp. at 742, App. 35a. Sanctions based on these subjective characterizations of CCTV's "programming" constitute the heart of this case.[34]

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[34] While the court of appeals implies that Chicago's L.O. regulation is speech "neutral", 879 F.2d at 1550, App. 18a, (citing *United States* v. *Albertini*, 472 U.S. 675, 689 (1985)), the fact is that the regulation classifies speech and speakers through establishing a hierarchy favoring "local" over "suburban" programming and producers. 678 F.Supp. at 745, App. 42a-43a; 879 F.2d at 1549-50, App. 16a-17a. Could Chicago, for example, extend favorable tax legislation or zoning privileges to the local newspaper in return for the right to supervise the publication's content or source of production? *Compare Buckley* v. *Valeo*, 424 U.S. 1, 48-49 (1976) ("the concept that government may restrict the speech of some elements of society in order to enhance the relative voice of others is wholly foreign to the First Amend-

That cable regulation in a *Preferred Communications* context (*i.e.*, where presumptively lawful regulation implicates First Amendment interests) appropriately calls for an *O'Brien* standard of review, does not suggest that such test is universally to be invoked where local regulation of cable-television media and First Amendment claims are joined. *Texas* v. *Johnson*, 109 S.Ct. 2533, 2538, 2531 (1989) (*O'Brien*'s "less stringent standard" of review is appropriate only where "noncommunicative conduct" alleged to be "expressive" is at issue) ("highlight[ing] the requirement that the governmental interest in question [must] be unconnected to expression in order to come under *O'Brien*'s less demanding rule"). The fundamental error of the courts below is the threshold failure to distinguish between appropriate governmental supervision of "noncommunicative conduct" that may "implicate" the First Amendment and constitutionally suspect "communicative" regulation.

It is *facial* content-regulation that must here survive First Amendment scrutiny. There is nothing subtle about the City's intent to limit the source and subject-matter of programming distributed over a privately owned, fully protected medium of expression. Nor is there the finding below, or even the suggestion, that CCTV's editorial discretion or its originated programming are not entitled to the full protections of the First Amendment.[35] Chicago is not engaged

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ment"). And what about, for example, "the show 'Illinois Reads' " which "may be of interest to some Chicago cable customers", 678 F.Supp. at 742, App. 35a-36a, but which is disqualified under the City's L.O. categorization of programming?

[35] The court of appeals does note that "[u]nlike the traditional forms of print media, a cable programmer enjoys a virtual mo-

here in supervising the "noncommunicative conduct" of cable media but rather in directly restricting *communications* and *communicative* activities. When the court below says that government possesses the "right [ ], arguably [the] responsibilit[y], to proffer some [programming] requirements", 879 F.2d at 1550, App. 19a, it ignores the command of the First Amendment and contradicts the choice of the forefathers *constitutionally* to *separate* government from even the temptation to regulate speech and press.

Limitations *directly* placed by Chicago on CCTV's editorial judgments and programming content, regardless of their severity or "reasonableness", may be constitutionally justified, if at all, only when the restriction is demonstrated to promote a "compelling [city] interest" *and* to be "the least restrictive means to further that articulated interest". *Sable Commu-*

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nopoly over its area [and that] the government, which serves as the representative of cable customers, is duty-bound to recognize the effects of 'medium scarcity' by ensuring that the few programmers who are granted a franchise make optimum use of it . . . With this in mind, it is within the City's rights, arguably its responsibilities, to proffer some [programming] requirements . . . ". 879 F.2d at 1550, App. 18a-19a. But in very much the same context, albeit with respect to print media, this Court said: "However much validity may be found in these arguments, at each point the implementation of a remedy such as an enforceable right of access necessarily calls for some mechanism, either governmental or consensual. If it is governmental coercion, this at once brings about a confrontation with the express provisions of the First Amendment . . . ". *Miami Herald Pub. Co.*, 418 U.S. at 254 (footnote omitted). *See also Burstyn* v. *Wilson*, 343 U.S. 495, 503 (1952) ("[while e]ach method [of speech] tends to present its own peculiar problems. . . . the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary").

nications v. *F.C.C.*, 109 S.Ct. 2829, 2836 (1989).[36] No such showings are made, or attempted, in the decisions below. Therefore, Chicago's L.O. regulation is, at minimum, presumptively unconstitutional. More importantly here, the failure of the courts below to apply the appropriate First Amendment standard of review to the City's content-based regulation of cable media constitutes a denial of CCTV's constitutionally guaranteed freedoms.

2. While the Constitutional Error Committed by the Courts Below is of a Fundamental Character, the Confusion is not Uncommon Among the Lower Courts

The Court need look no further than the opinions of the district court and the court of appeals in this case for appreciation of the disparate, conflicting range of views among the lower courts on this fundamental constitutional question. *See* 678 F.Supp. at 744-45, App. 40a-41a (cataloging the "varying results [reached by other lower courts] in determining the degree of First Amendment protection to be accorded cable television operators"); 879 F.2d at 1548-49, App. 13a-15a.

Similarly, the court of appeals below erroneously cites two D.C. Circuit cases to support application of

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[36] If indeed "original cable programming specifically concerning the locality and directed at the locality's residents", 879 F.2d at 1550, App. 17a, qualifies as a "compelling" or even "substantial" interest under relevant First Amendment jurisprudence, we note that designated "cable access" channels over petitioners' distribution facilities are presently available to the City or its designees for such purposes. *See ante* n.7.

O'Brien's balancing process to the facts *sub judice*.[37] *Id.* at 1549, App. 15a. Yet *Century*, explicitly discussing the question, held:

> The precise level of first amendment protection due a cable television operator is clearly an issue of much moment . . . . However, having closely analyzed the rationale for and workings of the [FCC's] new must-carry rules, we conclude that we again need not resolve this vexing question. [For the rules] fail . . . to satisfy even the less-demanding first amendment test of *United States* v. *O'Brien*.

Century, 835 F.2d at 298. And in *Quincy*, the D.C. Circuit, on the same score, skeptically stated—

> "our review leaves us with serious doubts about the appropriateness of invoking *O'Brien*'s interest-balancing formulation . . . ".

Quincy Cable TV, 768 F.2d at 1448. *See also* the Ninth Circuit's treatment of the question prior to this Court's remand, *Preferred Communications, Inc.* v. *City of Los Angeles*, 754 F.2d 1396, 1401-1410 (9th Cir. 1985), as it contrasts with the First Amendment holdings in the opinions below.[38]

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[37] *Century Communications Corp.* v. *F.C.C.*, 835 F.2d 292 (D.C. Cir. 1987), *cert. denied*, 108 S.Ct. 2014 (1988); *Quincy Cable TV, Inc.* v. *F.C.C.*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986).

[38] Both lower courts here explicitly note the absence of Supreme Court guidance in the area of governmental regulation of cable television media, and each more than implies a need therefor. 879 F.2d at 1548-49, App. 13a-15a; 678 F.Supp. at 744-45, App. 40a-41a.

See also, e.g., Erie Telecommunications, Inc. v. *City of Erie*, 853 F.2d 1084, 1096-99 (3d Cir. 1988), where the Third Circuit, achieving the same constitutional result as that reached by the Seventh Circuit in this case, but by a different route, holds that the local "franchising" relationship involving municipalities and their authorized cable operators can operate to permit cities directly to supervise protected speech activity.[39] Although government is *constrained* by the First Amendment from "mak[ing any] law . . . abridging the freedom of speech, or of the press", it is the view of the Third Circuit that cities and their locally licensed cable systems, through the simple device of a negotiated "contractual waiver", 853 F.2d at 1096, may negate the constitutional constraint thus enabling local authorities to enforce the very regulatory schemes which the First Amendment, except under demonstrated "compelling" circumstances, forbids.[40]

This Court's direction is sorely needed to bring about some reasonable measure of uniformity to the

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[39] *Erie Telecommunications* is relied upon by the court of appeals below, 879 F.2d at 1548, App. 15a, for "appropriate" application of the *O'Brien* standard of review to First Amendment examination of Chicago's facially "communicative" L.O. regulation.

[40] That cable operators, at the importuning of cities or others, may "contractually waive" their speech freedoms or "rights", and thereby affirmatively empower local government to exercise that authority which the legislature is constitutionally foreclosed from extending, represents an extraordinary theory of law. *Erie Telecommunications*, 853 F.2d at 1096-97. We respectfully suggest that "cable operators", whatever the circumstances and however they may be disposed to "knowingly, voluntarily and intelligently relinquish[ ]" their First Amendment rights, *id.* at 1101, lack the influence to neutralize the *bar* which the Constitution fixes on governmental regulation of protected speech.

actions of the lower courts in the increasingly important area of communication via electronic media and to restore the fundamental integrity of the First Amendment under established precedent.

CONCLUSION

What is at issue here is the power of local officials, directly or by more subtle means, to intrude on the special preserve of Speech and Press to influence the content of "programming" distributed over fully protected communications media. The petition presents an important question of constitutional law, one erroneously decided by the court below and destined to generate still further confusion among other lower courts, and should be granted.

Respectfully submitted,

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November 9, 1989

APPENDIX

PETITIONERS' APPENDIX
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United States Court of Appeals,
Seventh Circuit.

No. 88-1195.

CHICAGO CABLE COMMUNICATIONS, South Chicago Cable, Inc., and Communications and Cable of Chicago, Inc.,
Plaintiffs-Appellants,

v.

CHICAGO CABLE COMMISSION and City of Chicago, a municipal corporation,
Defendants-Appellees.

Argued June 8, 1988.

As Amended on Denial of Rehearing Aug. 15, 1989.

Decided July 19, 1989.*

* * *

Before CUMMINGS, COFFEY and KANNE, Circuit Judges.

CUMMINGS, Circuit Judge.

The Chicago Cable Commission (the "Commission"), pursuant to Chapter 113.1 of the Municipal Code of Chicago, regulates the franchising of all cable television services for the City of Chicago. Plaintiffs in this case are three affiliated cable television service corporations, Chicago Cable Communications, South Chicago Cable, Inc., and Communications and Cable of Chicago, Inc. (collectively herein "CCTV" for "Chicago Cable TV"). They were fined

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* The delay in issuing this opinion was caused by lengthy panel deliberations about the outcome.

$60,750 collectively by the Commission for allegedly violating the "local origination" ("LO") provisions of their identical franchise agreements with the City. They sought restitution of this fine through review in the district court, which ultimately affirmed the administrative agency's actions. 678 F.Supp. 734, 736 (N.D.Ill.1988). On appeal, CCTV contends that the City and particularly the Commission violated its rights to (1) due process by giving it inadequate notice or opportunity to be heard on the charges that it violated the franchise agreement, (2) equal protection by treating CCTV differently from another cable company which was not fined, and (3) free expression under the First Amendment due to impermissible content regulation.[1] We affirm.

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[1] CCTV also asserts that there was no evidence in the record sufficient to support the Commission's findings. It claims that nothing demonstrates that the Commission ever viewed any LO programming. This, however, is a meritless argument, for CCTV itself failed to provide copies of its schedules; it only sent written descriptions. CCTV additionally admitted that its programs were produced in Mount Prospect, Illinois, not in Chicago. Accordingly, we hold here that there existed substantial evidence to support the Commission's findings. *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229, 59 S.Ct. 206, 216, 83 L.Ed. 126 (1938); *NLRB v. Burkart Foam, Inc.*, 848 F.2d 825, 829 (7th Cir.1988).

Secondly, while CCTV claimed below that the Commission unreasonably interpreted the LO provision in the franchise agreement to require programming with a local focus, it now concedes on appeal that "the reasonableness of the definition is not the issue" (Br. 26 n. 17).

CCTV has a third argument that additionally merits summary disposition. It argues that it complied with the franchise agreement's provision authorizing grantees to use contractors to produce programming (Br. 4546). Yet the violation was really based on the non-local production. Even if Group W Cable, another Chicago area franchisee, may be considered such a "contractor" under the agreement (Attachment G1 at App. 35), this fails to justify CCTV's not providing programming produced in Chicago by anyone to meet its minimum LO requirements.

The parties largely agree with the statement of facts provided by the district court[2] regarding LO programming[3] and the Commission's regulatory efforts. 678 F.Supp. at 736-739. This Court therefore will not restate this summary in detail, but instead will focus on the Commission's imposition of sanctions to determine whether a due process, equal protection, or First Amendment violation occurred. In so doing we are guided by the district court's factual findings unless they are erroneous. Cf. Fed.R.Civ.P. 52(a); *Anderson v. City of Bessemer City*, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985); *Evanston Bank v. Brink's, Inc.*, 853 F.2d 512, 516 (7th Cir.1988).

I

Chapter 113.1 of the Municipal Code created five separate areas for cable services for the City of Chicago. CCTV was granted the franchises for Areas 1, 4 and 5, while a different company, Group W Cable (not a party to this litigation), was awarded the franchises for Areas 2 and 3. The franchise agreements between the City and grantees CCTV and Group W required the grantees both to produce and program a certain amount of LO programming per week, with each grantee to produce in Chicago one-half of the total required programming according to an agreed schedule. The grantees were to pledge up to $6,000,000 to produce this programming for 15 years and jointly to equip an LO production facility with staff con-

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[2] The Commission contests the district court's statement that the City awarded CCTV "the exclusive right" to provide cable service for each of CCTV's franchise areas (Br. 3 n. 1). It correctly points out that the franchise agreement designates that the franchisee for each area is granted a "non- exclusive franchise."

[3] "LO programming" is defined by the National Cable Television Association as "programming . . . which is developed by an individual cable television system specifically for the community it serves." 678 F.Supp. at 740. Here the franchised areas were all in Chicago.

sisting of local residents used for both full and part-time internship purposes. During the period involved here, CCTV and Group W Cable were obliged to transmit a total of nine hours local programming per week, and they divided this obligation evenly.

The Commission was created within the Mayor's office to supervise this regulation and to enforce the terms of the franchise agreements against the cable companies. After its initial July 1986 meeting, Commission Chairperson Robin Charleston requested Group W and CCTV to submit monthly reports on their LO scheduling, and in August, Group W responded for both, reporting that CCTV was "presently considering contracting its program production efforts to a third party [Cablenet, a suburban affiliate of CCTV] who would supply all necessary production manpower." This progress report was reiterated in Group W's monthly statement for September 1986.

In October, both grantees began to transmit their four and one- half hours apiece of LO programming. The Commission congratulated them on meeting the initial requirements for scheduling. The November meeting proceeded without problems; yet at the December meeting, the Commission, upon noticing that CCTV's monthly report on LO scheduling was less descriptive than Group W's report, asked CCTV for a sample of its LO programming.

Controversy between all concerned arose at the January 13, 1987, meeting when Chairperson Charleston requested the Commission's authorization to issue a "Notice of Violation" of the franchise agreement against CCTV allegedly because:

1. CCTV has not demonstrated how their current programming is actually local origination in that it is actually locally produced (within the City of Chicago) and is [instead] solely under the control of TCI [Telecommunications, Inc., Mt. Prospect, Illinois, affiliate of CCTV].

2. CCTV has not provided documentation on the provision of one full-time non-alphanumeric [video] channel and two alphanumeric channels in each Area.

3. No documentation of efforts to establish internship programs for local residents and ongoing relationships with local schools.

4. CCTV has not documented its [one-half] share of the nine hours required weekly in Year 1 for L.O. programming.

5. No documentation or proofs of joint participation with other [Chicago] area grantees in centralized L.O. studio and mobile equipment has been provided by CCTV.

678 F.Supp. at 740. This action was done pursuant to Section 29 of the franchise agreement, which sets forth the procedure by which the Commission may enforce the terms of the agreement. The first step in any enforcement proceeding is the issuance of a notice of violation in writing setting forth the specific nature of the violation. The grantee then has 30 days (or less if the Commission determines the violation is so serious that a shorter time period is warranted) either to remedy the violation or to respond in writing contesting the notice of violation with supporting documentation indicating either that the violation did not occur or it was beyond the grantee's control, and requesting an opportunity to be heard. If after contesting the violation, the grantee fails to prove a violation did not occur, the Commission then may penalize the grantee. The Commission may fine the grantee up to $750 per day per violation, and must notify the grantee of the violation and fine by issuing a "Notice of Assessment." 678 F.Supp. at 739 n. 10.

CCTV responded to the January 15, 1987, notice of violation, stating that of the total nine hours of LO programming per week required of it and Group W, 4.5 hours

came from Group W in Chicago and 4.5 hours came from CCTV's affiliated companies in the surrounding suburban area. CCTV also stated that it selected shows from a pool of all available suburban shows it believed would be interesting to its Chicago customers. However, it did not demonstrate that the 4.5 hours were geared to Chicago as required by the franchise agreements.

At its February 10, 1987, meeting, Chairperson Charleston recommended that CCTV be fined for violating the franchise agreements. The Commission heard testimony from Diane Minor, a staff member, as well as from Michael Green, CCTV's general manager. After this hearing, the Commission found a violation and fined CCTV $750 for each day for each of the three areas it was to serve. The notice of assessment sent to CCTV stated in pertinent part:

> THE CHICAGO CABLE COMMISSION FINDS AS FOLLOWS:
>
> 1. Based on the submission by CCTV/TCI, the programming shown over CCTV/TCI's local origination channels and claimed by CCTV/TCI to satisfy its local origination obligations as Grantees for Areas 1, 4, and 5 "is acquired through [CCTV/TCI's] affiliated TCI companies in the surrounding Chicagoland area" instead of being produced by CCTV/TCI itself. Furthermore, based on the submission by CCTV/TCI, the subjects of the programming are, for the most part, geared to the broad City-suburban Chicagoland areas rather than the communities that CCTV/TCI serves.

678 F.Supp. at 741. CCTV quickly filed a petition for rescission of this violation and assessment while raising numerous legal challenges. In response, Charleston requested evidence that CCTV produced the requisite LO shows and did so within Chicago, while CCTV claimed that Group W was to be in charge of all production concerns. At the March meeting, the Commission voted to deny

CCTV's petition and assessed fines of $750 per day, for 27 days for the three areas, totaling $60,750. The Commission also decided that in the meantime CCTV had subsequently remedied its past violation through an arrangement with Group W.

II

Due Process

CCTV argues on appeal that its due process rights were compromised because the Cable Commission adopted a new definition for the term "local origination" at the February 10 meeting and then found CCTV in violation. CCTV submits that local origination had previously only referred to physical production in Chicago, which was the stated reason for the notice of violation, but that the February 10 notice of assessment cited CCTV both for failing to provide locally produced programming as well as community- specific programming. CCTV asserts that its due process rights were compromised when the Commission changed the standards governing local origination without notice and therefore fined CCTV. It also contends that the January 15 notice of violation charged it only with a failure to document compliance and not with a specific failure to comply. CCTV further asserts that before the Commission's January 13, 1987, meeting, CCTV was not advised that the Commission might authorize issuance of a violation notice against it at that time and that at said meeting, the Commission refused to allow CCTV to respond to the charges.

The legal principles involved in this case are clear regarding notice and opportunity. Prior to deprivation of life, liberty or property, due process requires that a governmental entity must provide a citizen adequate notice, *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972), as well as ample opportunity to be heard at a meaningful time and in a meaningful manner appropriate

to the nature of the case. *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 902, 47 L.Ed.2d 18 (1976); *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 656 94 L.Ed. 865 (1950). In *Mathews*, the Supreme Court recited three factors required in a due process analysis in the context of a challenge to hearing procedures:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. at 335, 96 S.Ct. at 903; see also *Birdsell v. Board of Fire and Police Comm'rs*, 854 F.2d 204, 207 (7th Cir.1988) (listing factors).

Adequate notice both apprises the individual of the hearing and permits adequate preparation to present objections. *Memphis Light, Gas and Water Div. v. Craft*, 436 U.S. 1, 13, 98 S.Ct. 1554, 1562, 56 L.Ed.2d 30 (1978); *Wolff v. McDonnell*, 418 U.S. 539, 577-578, 94 S.Ct. 2963, 2985-86, 41 L.Ed.2d 935 (1974). In *Memphis Light*, the Court held that its "flexible" approach to due process, taking account of private interests, the potential for reducing erroneous deprivations and the costs of procedures needed to reduce errors, applies to evaluations of notice as well as the procedures at the hearing. *Id.* 436 U.S. at 14 n. 15, 98 S.Ct. at 1563 n. 15; see also *Tulsa Professional Collection Servs., Inc. v. Pope*, 485 U.S. 478, 108 S.Ct. 1340, 1344-1347, 99 L.Ed.2d 565 (1988) (sufficiency of notice depends on balance of state and individual interests); *Mullane*, 339 U.S. at 313-314, 70 S.Ct. at 656657 (balancing state's interest in reducing costs of notice to

beneficiaries of small, jointly managed trusts against beneficiaries' "right to be heard," before opportunity to challenge trustees' action was foreclosed); *Birdsell, supra*, 854 F.2d at 207-208 (inaccurate nature of termination hearings outweighs any slight benefits accruing to the City); *Wilson v. Health & Hosp. Corp.*, 620 F.2d 1201, 1214 (7th Cir.1980) ("elements to be included in the notice are to be tailored to the circumstances of the case and depend upon an appropriate accommodation of the competing private and governmental interests").

"It is universally agreed that adequate notice lies at the heart of due process. Unless a person is adequately informed of the reasons for denial of a legal interest, a hearing serves no purpose—and resembles more a scene from Kafka than a constitutional process." *Cosby v. Ward*, 843 F.2d 967, 982 (7th Cir.1988) (quoting *Gray Panthers v. Schweiker*, 652 F.2d 146, 168 (D.C. Cir.1980)). Parties must be notified of the precise issues to be raised in the hearing. *In re Ruffalo*, 390 U.S. 544, 550551, 88 S.Ct. 1222, 1225-1226, 20 L.Ed.2d 117 (1968); *Camacho v. Bowling*, 562 F.Supp. 1012, 1020-1022 (N.D.Ill.1983), and such notice must be provided "at a meaningful time." *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965).

In an administrative context such as this, an agency complaint that reasonably informs a person of the controversial issues involved satisfies due process unless that person can demonstrate that he or she was misled. *L.G. Balfour Co. v. FTC*, 442 F.2d 1, 19 (7th Cir.1971) (quoting *Cella v. United States*, 208 F.2d 783, 789 (7th Cir. 1953), certiorari denied, 347 U.S. 1016, 74 S.Ct. 864, 98 L.Ed. 1138 (1954)). Moreover, just because an agency violates its own rules under state law does not turn an administrative case into a denial of due process of law, see, *e.g.*, *Herbert v. Louisiana*, 272 U.S. 312, 316, 47 S.Ct. 103, 104, 71 L.Ed. 270 (1926); *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461 (7th Cir.1988), and we may look to

state law[4] to determine whether there is a "legitimate claim of entitlement." *Vukadinovich v. Bartels*, 853 F.2d 1387, 1389 n. 3 (7th Cir. 1988).

A review of the facts of this case convinces us that CCTV was provided with an ample opportunity to be heard at a meaningful time and in a meaningful manner. *Mathews*, 424 U.S. at 333, 96 S.Ct. at 902. First and foremost, the notice of violation given to CCTV was sufficient to apprise it of the charged violation. It repeated all five alleged violations. In pertinent part the notice alleged that plaintiffs had failed "to document how their current programming is actually local origination" and "locally produced" and that CCTV had failed "to document their participation in the production of nine hours [split evenly between CCTV and Group W] required weekly in year I for L.O. programming." It also directed that each of the three CCTV franchisees, within fifteen days of receipt of the notice, either respond in writing to the Commission contesting the notice of violation with supporting documentation to show otherwise and requesting an opportunity to be heard, or remedy the particular violation. (Exhibit 2 to Commissioner's Administrative Record.)

Contrary to its contention, CCTV was fined not for violating a new definition of local origination, but rather for failing to produce programming in Chicago, as stipu-

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[4] Illinois law provides:

> Every action to review any final administrative decision shall be heard and determined by the court. . . . The hearing and determination shall extend to all questions of law and of fact presented by the entire record before the court. No new or additional evidence in support of or in opposition to any finding, order, determination or decision of the administrative agency shall be heard by the court. The findings and conclusion of the administrative agency on questions of fact shall be held to be prima facie true and correct.

Ill.Rev.Stat. ch. 110, para. 3110 (1987).

lated in the notice of violation. Whatever else was subsequently added to the meaning of local origination was surplusage as far as this issue is concerned. The franchise agreement clearly envisioned local production, the notice of violation was based on the same requirement, and the ultimate notice of assessment premised the violation on local production, although "[f]urthermore" criticizing CCTV's suburban-type subject matter. That the lack of Chicago production was the true basis for the fine is manifested as well by the parties' subsequent conduct at the hearing on CCTV's motion to reconsider. After the assessment occurred, CCTV presented a plan to the Commission in which CCTV and Group W would jointly produce their local origination programming at a local Chicago facility, rather than in Mount Prospect, the site of the programming for which CCTV had been fined. Based on this proposal the Commission decided to withhold imposition of further fines until the new programming was produced. No mention was even made as to the suburban content of the programming. This further highlights the fact that CCTV was fined for non-compliance with the local production requirement rather than for suburban-oriented content, as shown in the notice of violation. CCTV accordingly had notice of the charge against it.

CCTV's second claim of denial of due process centers on its argument below that the violation notice solely charged it with a failure to document compliance, not with a substantive failure to comply. Yet, as correctly held by the district court, "CCTV does not claim that it could prove compliance other than via documentation." 678 F.Supp. at 747. On appeal, it still does not state any evidence to document compliance, and therefore its omission is tantamount to a failure to comply, as the district judge noted. 678 F.Supp. at 747.

CCTV's final due process contention is that it was not permitted to speak or to make a presentation before it received a notice of a violation. However, there is no con-

stitutional right to be told of an impending notice of violation as long as there is sufficient notice prior to the actual deprivation of property, as there was here. See *Tavarez v. O'Malley*, 826 F.2d 671, 674 (7th Cir.1987).

Equal Protection

CCTV claims that the Commission violated its right to equal protection of the laws under the Fourteenth Amendment by fining it but not Group W, which had cablecast the same amount of programming acquired from suburban Cablenet. The franchise agreement between the grantees and the City stipulated that both CCTV and Group W were jointly and severally liable for cablecasting nine hours of LO programming. While Group W's share was produced in Chicago and had a Chicago focus, CCTV's portion of LO shows was produced in Mount Prospect, Illinois, and was not geared to Chicago.

As below, CCTV relies on *Ciechon v. Chicago*, 686 F.2d 511 (7th Cir.1982), for the sweeping proposition that selective enforcement of identical franchise agreements denies equal protection. In *Ciechon*, this Court found that the City of Chicago violated equal protection by firing only one of two paramedics, both of whom had been called to rescue a victim. In *Ciechon*, both paramedics were equally responsible, and therefore differential treatment was not justified. In this case, however, the Commissioner's decision to fine CCTV alone was justified since only CCTV was responsible for not presenting weekly four and one-half hours programmed for and produced in Chicago and therefore violating the agreement. CCTV's attempt to align its case semantically with *Ciechon* on the basis of "equal responsibility" therefore fails.

First Amendment

CCTV claims that the Commission's imposition of a fine based partly on the subject matter of its required four

and one-half weekly hours of LO programming[5] constituted impermissible content regulation, thereby violating its First Amendment right to free expression. This is a novel question, for the Supreme Court has yet to determine the applicable standard for review of a challenge to a municipal regulation of cable television. See *City of Los Angeles v. Preferred Communications*, 476 U.S. 488, 496, 106 S.Ct. 2034, 2038, 90 L.Ed.2d 480 (Blackmun, J., concurring).

The court below concluded that the appropriate framework for analysis in this case was provided by *United States v. O'Brien*, 391 U.S. 367, 377, 88 S. Ct. 1673, 1679, 20 L.Ed.2d 672 (1968):

> a government regulation is sufficiently justified [1] if it is within the constitutional power of the Government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged first amendment freedoms is no greater than is essential to the furtherance of that interest.

678 F.Supp. at 745.[6] The defendants have the burden of proving that the second and fourth elements of this test

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[5] As noted earlier, by agreement between the grantees, Group W was to produce the other four and one-half weekly hours of LO programming.

[6] Conceivably it could also be argued that CCTV contractually waived its First Amendment claim. In *Erie Telecommunications v. City of Erie*, 853 F.2d 1084 (3d Cir.1988), the Third Circuit, after determining that constitutional rights, like rights and privileges of lesser importance, may be contractually waived, construed a consent decree settling a lawsuit between two rival cable programmers and the City of Erie as barring a later action by one of the cable programmers against the City. Since the consent decree settled a suit which included a First Amendment claim, the Third Circuit believed a later comparable First Amendment claim to be waived. Of course in this case the only contract was the initial franchising agreement, a significant distinction from

are satisfied.[7] *Century Federal Inc. v. City of Palo Alto*, 648 F.Supp. 1465, 1475 (N.D.Cal.1987), appeal dismissed, ___U.S. ___, 108 S.Ct. 1002, 98 L.Ed.2d 969 (1988).

CCTV's scheduling plainly implicates First Amendment interests, for cable operators exercise "a significant amount of editorial discretion regarding what their programming will include." *Preferred Communications*, 476 U.S. at 494, 106 S.Ct. at 2037 (quoting *FCC v. Midwest Video Corp.*, 440 U.S. 689, 707, 99 S.Ct. 1435, 1445, 59 L.Ed.2d 692 (1979)). The Supreme Court has interpreted the First Amendment to allow more government regulation of television than of theaters, movies, books, newspapers, or open air addresses. Compare *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969), with *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974). We adhere to our position that "there are enough differences between cable television and the non-television media to allow more government of the former." *Omega Satellite Prod. v. City of Indianapolis*, 694 F.2d 119, 128 (7th Cir.1982); see also *Community Communications Corp. v. City of Boulder*, 660 F.2d 1370, 1377-1380 (10th Cir.1981), certiorari dismissed, 456 U.S. 1001, 102 S.Ct. 2287, 73 L.Ed.2d 1296 (1982), where the court noted that as to cable television "gov-

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Erie, and serious reservations arise when a local government with a virtual monopoly on the cable access conditions a franchise contract with a cable programmer on the stipulation that the programmer waive certain constitutional rights, see, *e.g.*, *Western & Southern Life Ins. Co. v. State Board of Equalization*, 451 U.S. 648, 657-658, 101 S.Ct. 2070, 2077-2078, 68 L.Ed.2d 514 (1981); *Sherbert v. Verner*, 374 U.S. 398, 404405, 83 S.Ct. 1790, 17941795, 10 L.Ed.2d 965 (1963); *Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583, 592-593, 46 S.Ct. 605, 606-607, 70 L.Ed. 1101 (1926). In any event we need not decide this issue since neither party advanced this argument here or in the district court.

[7] As the district judge observed, the first and third requirements are satisfied (678 F.Supp. at 745 n. 14) and therefore will not be discussed in this opinion.

ernment must have some authority * * * to see to it that optimum use is made of the cable medium in the public interest." *Id.* at 1379. As other courts have held, *O'Brien* is an appropriate standard-bearer for dealing with questions of local regulation of cable television. See, *e.g.*, *Erie Telecommunications v. City of Erie*, 659 F.Supp. 580 (W.D.Pa.1987), affirmed, 853 F.2d 1084 (3d Cir.1988); *Carlson v. Village of Union City*, 601 F.Supp. 801 (W.D.Mich.1985); *Berkshire Cablevision of Rhode Island v. Burke*, 571 F.Supp. 976 (D.R.I.1983), vacated as moot, 773 F.2d 382 (1st Cir.1985). This is especially so here, where CCTV was only required to present four and one-half hours weekly of local origin programming.

Our adoption of an *O'Brien* test in the cable context does not justify abandoning First Amendment scrutiny due to the fact that cable operators require use of a public right of way or that the "natural monopoly characteristics" of cable create economic constraints on competitors comparable to the physical constraints imposed by the limited size of the electromagnetic spectrum. *Omega Satellite*, 694 F.2d at 127; see also G. Shapiro, P. Kurland, & J. Mercurio, *Cablespeech: The Case for First Amendment Protection* 911 (1983); R. Posner, *Cable Television: The Problem of Local Monopoly* 4 (1970). Rather, each medium of expression must be assessed by standards properly suited to it. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 501, 101 S.Ct. 2882, 2889, 69 L.Ed.2d 800 (1981).

A proper analysis under *O'Brien* begins with an appraisal of whether the interest to be served by a governmental measure is truly substantial. *Century Communications Corp. v. FCC*, 835 F.2d 292, 295 (D.C.Cir.1987). If it is, the next relevant step is to determine the fact-based issue of whether the means chosen are congruent with the desired end, or whether they are too broadly tailored to pass constitutional muster. See *O'Brien*, 391 U.S. at 377, 88 S.Ct. at 1679; *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1454-1462 (D.C.Cir.1985)

(using key two-step *O'Brien* analysis invoked here).[8] Since the municipal code and franchise agreement's LO requirements implicate the second and fourth parts of the *O'Brien* test (note 7 *supra*), we now proceed to show that they have been met by defendants.

1. *Substantiality of Governmental Interest*

The Commission and City content that these minimal LO rules serve the interest of preserving free, locally oriented television and provide an outlet for community expression and choice of programming. The four and one-half hour local programming requirement is said to improve communications between the citizens and the City as well as encouraging participation of minorities in the economic opportunities created by cable television. On the other hand, CCTV claims that there is no governmental interest furthered by regulating the content of LO programming.

Yet substantial governmental interests are at stake and fostered by LO programming requirements. In *United States v. Midwest Video Corp.*, 406 U.S. 649, 92 S.Ct. 1860, 32 L.Ed.2d 390 (1972), the Court held that the Federal Communications Commission could require cable operators to have facilities available for local production. *Id.* at 653654, 92 S.Ct. at 1863-1864. This origination rule would reasonably further the goals of "increasing the number of outlets for community self-expression and augmenting the public's choice of programs * * *." *Id.* at 668,

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[8] In contrast to the limited local programming requirement here, *Quincy Cable* invalidated all-encompassing "must carry" rules of the Federal Communications Commission requiring cable TV operators to transmit every over-the-air television broadcast signal that is significantly viewed in the community or considered local under its rules (768 F.2d at 1437), but the court of appeals assumed that less burdensome regulations furthering an important or substantial governmental interest would be permissible under the First Amendment. 768 F.2d at 1450, 1454.

92 S.Ct. at 1870. Similarly, the LO requirements in this case assure community participation in the production and programming of cable television. Cf. *Berkshire Cablevision*, 571 F.Supp. at 987.

Promotion of community self-expression can increase direct communication between residents by featuring topics of local concern. Encouragement of "localism" certainly qualifies as an important or substantial interest. See *Quincy Cable*, 768 F.2d at 1454. The district court focused on this by noting that

> [the] important qualities embodied in the term "localism" (community pride, cultural diversity, etc.) may not be furthered enough simply by the availability of local broadcast television stations for retransmission over cable systems, but may require original cable programming specifically concerning the locality and directed at that locality's residents. The Commission's L.O. requirement helps foster those interests by insisting that those cable companies operating within the City of Chicago produce their L.O. programming within the City of Chicago and designed specifically for City residents.

678 F.Supp. at 745.

An additional interest fostered by the defendants' LO requirement is the provision of jobs for residents of Chicago. Production of programming in the City provides career opportunities as well as potential internships for students studying communications at local schools. All of the above objectives of the LO rules are important and substantial concerns of the City, thereby satisfying the relevant second prong of *O'Brien*.

2. *The Congruence Between Means and Ends*

The pertinent fourth tier of the *O'Brien* test focuses on the congruence between the means chosen by the Commission to regulate cable television and the end it seeks

to achieve. While the Commission has adequately demonstrated the substantiality of the interest served by the LO rules, their validity also depends on whether these restrictions were "no greater than is essential to the furtherance of that interest." *Quincy Cable*, 768 F.2d at 1459 (quoting *O'Brien*, 391 U.S. at 377, 88 S.Ct. at 1679). Because the municipal code's and franchise agreement's LO requirements may be characterized as content-related, they "may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest." *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 540, 100 S.Ct. 2326, 2334, 65 L.Ed.2d 319 (1980); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 786, 98 S.Ct. 1407, 1421, 55 L.Ed.2d 659 (1976). Or, put another way, is each of the restrictions no greater than is essential to the furtherance of that interest?

United States v. Albertini, 472 U.S. 675, 689, 105 S.Ct. 2897, 2906, 86 L.Ed.2d 536 (1985), lends guidance by holding that burdens of this kind are not invalid just because there might be some less burdensome alternatives. "So long as the neutral regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation," an incidental burden on speech is permissible under *O'Brien*. *Id.* See also *Board of Trustees of State University of New York v. Fox*, ___ U.S. ___, 109 S.Ct. 3028, ___ L.Ed.2d ___ (1989) (under *O'Brien* means must be narrowly tailored but not necessarily the least restrictive alternative, citing *Clark v. Community for Creative Nonviolence*, 468 U.S. 288, 293, 104 S.Ct. 3065, 3068, 82 L.Ed.2d 221 (1984)).

Cable programming, like other forms of the electronic media, is an economically scarce medium. Unlike the traditional forms of print media, a cable programmer enjoys a virtual monopoly over its area, without the threat of an alternative provider. As a result the government, which serves as the representative of cable customers, is duty-

bound to recognize the effects of "medium scarcity" by ensuring that the few programmers who are granted a franchise make optimum use of it. See *Boulder*, 660 F.2d at 1379; *Berkshire Cablevision*, 571 F.Supp. at 986-987. With this in mind, it is within the City's rights, arguably its responsibilities, to proffer some requirements guaranteeing that the cable customers are, to the extent possible, accorded a range of programming from the franchisee, since the cable viewing public has no other channel to which to turn.

Finally, it is worth noting that CCTV is required to broadcast just four and a half hours of local origination programming per week. The City is not seeking a dominant interest in CCTV's cable programming, nor even a substantial interest, but simply a few hours a week. And of these four and a half hours of programming, CCTV is not required by the municipal code or franchise agreement to cablecast any specific program, kind of show, or editorial viewpoint. As long as the particular episode is geared to Chicago—be it sports, politics, news, weather, entertainment, etc.—CCTV has full discretion over what it may desire to transmit. This restriction on CCTV's control in meeting the minimal LO requirements does not divest it of discretion, for, as in *Midwest Video*, the cable operator here still retains the ultimate decision over which LO programs to air during the brief weekly period at issue. See *Berkshire Cablevision*, 571 F.Supp. at 984 (citing *Midwest Video*). The limited restriction at issue is really no greater than essential to further substantial City interests. It cannot be gainsaid that substantial interests of the community are well served by requiring some local programming. Considering the benefits to the community, this four and one-half hour weekly obligation is sufficiently modest to avoid First Amendment prohibition.

Conclusion

CCTV has not persuaded this Court that its due process, equal protection, or First Amendment rights were violated by the Commission's imposition of a $60,750 fine for breach of the franchise agreement. Accordingly, the district court's grant of summary judgment for the Commission and City of Chicago was proper.

Affirmed.

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

August 15, 1989.

CHICAGO CABLE COMMUNICATIONS, SOUTH CHICAGO CABLE, INC., and COMMUNICATIONS AND CABLE OF CHICAGO, INC.,

Plaintiffs-Appellants,

No. 88-1195 vs.

CHICAGO CABLE COMMISSION and CITY OF CHICAGO, a municipal corporation,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 87 C 2591
Paul E. Plunkett, Judge.

Before Hon. WALTER J. CUMMINGS, Circuit Judge Hon. JOHN L. COFFEY, Circuit Judge Hon. MICHAEL S. KANNE, Circuit Judge

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ORDER

On consideration of the petition for rehearing filed by plaintiffs-appellants,

IT IS ORDERED that lines 8 and 9 on page 3 of the slip opinion herein be amended to read:

> "cured. In so doing we are guided by the district court's factual findings unless they are erroneous. Cf. Fed."

The petition for rehearing is denied.

United States District Court, N.D. Illinois, E.D.

No. 87 C 2591.

CHICAGO CABLE COMMUNICATIONS, South Chicago Cable, Inc., and Communications and Cable of Chicago, Inc.,

Plaintiffs,

v.

CHICAGO CABLE COMMISSION and City of Chicago, a municipal corporation,

Defendants.

Jan. 21, 1988.

MEMORANDUM OPINION AND ORDER

PLUNKETT, District Judge.

The Chicago Cable Commission (the "Commission") regulates cable television ("CATV") services in the City of Chicago. Plaintiffs Chicago Cable Communications, South Chicago Cable, Inc., and the Communications and Cable of Chicago, Inc. (collectively, "Chicago Cable TV" or "CCTV"), are affiliated corporations providing CATV to Chicago residents under franchise agreements with the Commission. The Commission assessed a $60,750 fine against CCTV for violating one of the terms of the Franchise Agreement. In this proceeding, CCTV raises several constitutional, federal statutory, and state law objections to the imposition of the fine. For the following reasons, we affirm the Commission's assessment and enter summary judgment for Defendants, the City of Chicago and the Chicago Cable Commission.

FACTS

Local Origination

On February 10, 1982, the Chicago City Council adopted "the Chicago Cable Communications Ordinance" As Chapter 113.1 of the Municipal Code of Chicago ("Chapter 113.1"). Chapter 113.1 provides for the franchising and regulation of CATV systems within Chicago. In 1984 CCTV was awarded the CATV franchise for Areas 1, 4, and 5 of the City.[1] CCTV executed a "Cable Television Franchise Agreement" with the City for each of the areas in which it was awarded the right to provide CATV services (Exh. 15) (hereinafter the "Franchise Agreement.")

The Franchise Agreement requires the grantees to produce and program a certain amount of "local origination" (or "L.O.") programming each week.[2] (*Id.* section 18.) The Franchise Agreement sets forth a joint plan by CCTV and Group W to govern the provision of L.O. programming. (Exh. G, Attachment G1.) The grantees agreed to commit up to $6,000,000 to produce quality L.O. programming for up to fifteen years. They decided that a centralized approach to L.O. programming was best. They agreed to jointly produce one non-alphanumeric (i.e., video) L.O. channel for the entire City and to individually provide and program two alphanumeric channels for each franchise area. The grantees agreed that each company would pro-

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[1] Chapter 113.1 divided the City into five Areas. CCTV received the franchises for Areas 1, 4, and 5, and a different company, Group W Cable, was awarded the franchises for Areas 2 and 3. CCTV and Group W are often referred to as "Grantees" because the City granted them the CATV franchises.

[2] The obligation to transmit local origination programming began on October 2, 1986. During Year 1, the cable companies had to transmit at least nine hours L.O. programming per week. Thereafter, the companies had to increase their L.O. programming so that at least 12 hours per week would be transmitted in year 2; 15 hours in year 3; and 20 hours in year 4 and thereafter.

duce one-half of the total original local programming that had to be produced each week. The grantees also agreed to equip a central production studio, a mobile camera and production system (minicam), a post-production (editing) facility, a screening facility, a master control facility, and a central video maintenance facility. (Attachment G1.) The estimated cost of the facilities, equipment, and improvements on the central studio was $1,500,000.

In addition to jointly equipping an L.O. production facility, the grantees agreed to provide the staff necessary to develop and produce programming to fulfill their L.O. requirements. The Franchise Agreement stated that the cable operators would use "substantial efforts . . . to utilize and develop local talent for local origination purposes. In addition, the use of full-time and part-time internship programs for local residents should increase the local residents [sic] potential for employment as demand requires." (Attachment G1, ¶ 3.)

The Chicago Cable Commission's Regulatory Efforts

Chapter 113.1 created within the Mayor's Office a department named the Office of Cable Communications ("OCC"). The head of the OCC bore the title of Cable Administrator (during all the relevant times in this case, the Cable Administrator was Robin Charleston) and also served as the Chairman of the Chicago Cable Commission. Chapter 113.1 created the Commission to regulate the provision of CATV services within the City of Chicago. The Commission is required to hold open meetings at least once a month and to act as an intermediary between the subscribing public and the cable operators. The Commission's most important function, as far as we are concerned for this case, is the enforcement of the terms of Chapter 113.1 and the Franchise Agreements against the cable companies.

The Commission began active regulation and supervision of L.O. in the summer of 1986. (Exh. 14, Letters of June 5, 1986, and July 25, 1986).[3] That was the time during which CCTV and Group W began seriously preparing for the oncoming October 2, 1986, start-up date for L.O. programming.

The Commission first listed "Local Origination" on the agenda for its monthly meeting in July 1986. (Exh. 7, pp. 4, 112-143.) At the July meeting, representatives of Group W and CCTV/TCI[4] described their L.O. preparation efforts to date. These efforts included hiring employees, contacting community organizations for ideas for possible L.O. programming, contacting area schools for interns, and so on. (*Id.* at 114-116.) Group W described the studio and production facility it was building at its headend location.[5] (*Id.* at 117-121.) The Commission members inquired at great length regarding the kinds of L.O. programming the cable operators were planning to transmit to their customers. Suggestions were made regarding foreign language programming (Polish, Lithuanian, Spanish, Vietnamese, etc.), for example. (*Id.* at 116, 136.) In that vein, Commissioner Delgado stated:

> LO doesn't necessarily have to be for not-for-profit purposes, an example being if you were to take the format of *Chicago Magazine*, which is a . . . local mag-

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[3] All of the relevant correspondence between the grantees and the Commission, and all of the intra-Commission memoranda are included in the record as Exhibit 14. We shall identify the documents by the dates stated on the face of the document or with a brief description if needed.

[4] The Committee and the parties often refer to Plaintiffs as "TCI" in addition to "Chicago Cable TV." The three affiliated corporations which comprise "Chicago Cable TV" are subsidiaries of a Denver-based corporation named Telecommunications, Inc. Hence, the record at times refers to Plaintiffs as TCI.

[5] The headend location is the place from where cable signals are transmitted to the cable company's subscribers.

> azine that deals with the local restaurants, parks, community events, festivals, politics, anything that has to do with the metropolitan Chicago area, and so that LO would be used to cover those areas that have a local impact.

(*Id.* at 138-139.)

After the July Commission meeting, Robin Charleston wrote to Group W and CCTV requesting the submission of monthly reports on L.O. (Exh. 14, Letter of July 25, 1986.) In August, Group W responded on behalf of itself and CCTV. (Exh. 14, Letter of August 7, 1986.) In their report, Group W described the ongoing renovation of a central studio to be used by all the grantees, and the renovation of a smaller facility at Group W's headend location for use by the Area 2 and 3 franchisees. (*Id.*) Group W also reported that "Chicago Cable TV is presently considering contracting its program production efforts to a third party who would supply all necessary production manpower." (*Id.*, p. 2.)

On September 5, 1986, Group W (again on behalf of itself and CCTV) submitted its monthly L.O. report for September. (Exh. 14, Letter of September 5, 1986.) This report mostly discussed Group W's L.O. efforts, but reiterated that CCTV "is presently engaged in discussions with third parties regarding the provision of similar production services to generate local origination programming for Areas 4 and 5." (*Id.*) The report also provided a description of some of the programs Group W produced and planned to use to fulfill its L.O. obligations.[6]

On October 2, 1986, the grantees began transmitting nine hours of L.O. programming per week to their sub-

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[6] The list of Group W's L.O. programs included "Prep Game of the Week," "Prep Talk" (a sports talk show), "At the Top" (interviews with people from the Chicago area), "Sig's Celebrity Chefs" (a cooking show with Chicago entertainers), "Best of the Fests," and an unnamed Polish-language Catholic Mass.

scribers in Chicago. At the October Commission meeting, the Commission congratulated the grantees on commencing local origination programming on schedule on October 2, (Exh. 8, pp. 116-117.)[7]

At the November Commission meeting (on November 12, 1986), Michael Green appeared on behalf of CCTV. (*See* Exh. 9.) Although Mr. Green had been hired as CCTV's general manager the previous day, he appeared at the monthly meeting on behalf of CCTV. At the meeting, the Commission inquired as to the source of some of CCTV's L.O. programming. Ms. Charleston stated:

> Well, my understanding of what is going on in Area 5 with local origination is that Group W local origination programming is being shown in Area 5, and some of what Chicago Cable TV says is local origination originated by it is shown in Area 5, and that I understand to be Cablenet[8] programming, programming from another system entirely.
>
> And, as I said, this is information that I have gotten orally, you know, from being out at the headend, and . . . I do hope . . . that can be straightened out by written submissions as to what is being shown, because that is a concern[.]

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[7] CCTV did have some difficulty transmitting L.O. programming to Area 5. CCTV encountered difficulty in getting zoning approval to build a microwave relay tower at the Area 5 headend. CCTV did not receive zoning approval and a construction permit until about December 1, 1986 and could not begin construction until them. (Exh. 14, Letter of December 2, 1986.) The tower was completed December 12, 1986 (*Id.*, Letter of December 19, 1986). From November 7 through December 12, CCTV used playback equipment at its Area 5 headend to transmit L.O. programming to its Area 5 subscribers. (*Id.*, Letter of November 7, 1986).

[8] Cablenet is a CATV operator in the northwest suburbs of Chicago and is an affiliate of CCTV. Cablenet has its main offices in Mt. Prospect, Illinois.

(Exh. 9, p. 129.)

In response, Mr. Green initiated the following colloquy:

> MR. GREEN: . . . And I guess the only other thing, for the record, I concur. And I was in attendance at a meeting, at a brief meeting with the Chairman, concerning the L.O. and where the programming comes from.
>
> And I just want to go on the record for saying that as far as I am concerned, it should be local City of Chicago programming.
>
> CHAIRMAN CHARLESTON: That's real important.
>
> MR. GREEN: And that's what we intend to do.
>
> CHAIRMAN CHARLESTON: I really appreciate that.

Id. at 131.

A few days later, Mr. Green wrote to Ms. Charleston, further explaining CCTV's position on L.O. (Exh. 14, Letter of November 17, 1986):

> The concerns expressed by you and the Commissioners at the last Commission meeting have prompted us to reevaluate our approach to local origination programming. We are currently establishing an internal plan for L.O. and soon will be approaching outside sources for their input.
>
> Roughly our L.O. program will involve contracting with several companies who have either the necessary equipment or the production talent that is needed. We hope to approach local producers' associations and minority producers to establish a base of production talent.
>
> We will supply you with more details and a clear time frame when we have solidified some of our ideas. Any suggestions the Commission may have are greatly appreciated.

> It is important to note that the local origination programming which is currently aired on our L.O. channel does comply with Section 18 and Exhibit G of the franchise agreement. However, we agree with the Commission that local origination programming would be more effective if it were produced by Chicago producers on Chicago subjects.

CCTV's December L.O. report listed and described the L.O. programming it was airing. (*Id.*, Letter of December 4, 1986.)[9] At the Commission's December meeting (Exh. 10), the topic of L.O. was discussed only briefly. Group W shows a videotape containing a sample of its L.O. programming to the Commissioners, and the Group W representative stated that CCTV's L.O. programming was similar. (*Id.* at 29.) Ms. Charleston lauded the programming, calling it a "spectacular production." (*Id.*) The Commission noted that CCTV's monthly report on L.O. was less graphic than Group W's report and asked for a sample of CCTV's L.O. programming in the near future. (Exh. 10, p. 36.) No discussion of the source or content of CCTV's L.O. programming occurred.

Imposition of Sanctions

At the next Commission meeting, on January 13, 1987 (Exh. 11), Ms. Charleston requested authorization to issue a Notice of Violation against CCTV regarding its L.O.

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[9] CCTV's December report listed seven programs and a summary of their content: "Traveling Fare" (presents restaurant reviews and recipes); "Smart Money" (discussion of personal finance and investments); "Positively Single" (presents topics of interest to single adults); "Lights on Chicago" (covers activities, personalities and events prominent in Chicago); "Sometimes Live" (a comedy and improvisation show); "Illinois Reads" (presents interviews with authors); and "Grassroots" (a roundtable political discussion). In January, CCTV began telecasting two other L.O. programs: "Chuck Schaden's Nostalgia" (a look at the Chicago area's cultural past) and "The Pulse" (features rock bands from the Chicago area).

programming.[10] There were five reasons cited by Ms. Charleston for believing CCTV was in violation:

1. CCTV has not demonstrated how their current programming is actually local origination in that it is actually locally produced (within the City of Chicago) and is solely under the control of TCI.

2. CCTV has not provided documentation on the provision of one full-time non-alphanumeric channel and two alphanumeric channels in each Area.

3. No documentation of efforts to establish internship programs for local residents and ongoing relationships with local schools.

4. CCTV has not documented its share of the nine hours required weekly in Year 1 for L.O. programming.

5. No documentation or proof of joint participation with other area grantees in centralized L.O. studio and mobile equipment has been provided by CCTV.

(Exh. 2, pp. 34.)

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[10] Section 29 of the Franchise Agreement sets forth the procedure by which the Commission may enforce the terms of the agreement. The first step in any enforcement proceeding is the issuance of a notice of violation. "If the Commission has reason to believe that Grantee is in violation of [this Agreement], the Commission shall notify Grantee in writing of the violation setting forth the nature of such violation." Franchise Agreement, sec. 29.2. The Grantee then has 30 days (or less if the Commission determines the violation is so serious that a shorter time period is warranted) to either remedy the violation or to respond in writing contesting the notice of violation with supporting documentation indicating either that the violation did not occur or it was beyond the Grantee's control, and requesting an opportunity to be heard. (*Id.*) If after contesting the violation, the Grantee fails to prove a violation did not occur, the Commission may penalize the Grantee. (*Id.*, sec. 29.3.) The Commission may fine the Grantee up to $750 per day per violation (sec. 29.6), and must notify the Grantee of such violation and fine by issuing a Notice of Assessment. (Sec. 29.3.)

During the Commission's discussion of whether to issue the notice of violation, Commissioner Hubbard expressed her surprise at the Chairman's request for issuance of a notice of violation because she thought CCTV had not been asked to provide further information on its L.O. programming at the last meeting when CCTV presented its L.O. report. (Exh. 11, p. 128.) In response, the Chairman stated that there was correspondence to CCTV, that the Commission did discuss CCTV's earlier problems with Area 5 (*see* n. 7, *supra*, and accompanying discussion), and "I have always expressed great reservations and dissatisfactions about Chicago Cable TV's local origination requirements." (Exh. 11, pp. 128-129.) After further discussion during which Commissioner Hubbard reiterated her concerns about the procedures being used (*id.* at 130-133), Chairman Charleston stated, "I don't think the cable company is being caught by surprise that it is not in compliance. In fact, I am positive the cable company knows that it's not in in compliance." (*Id.* at 133.) The Commission then voted to issue the notice of violation and to give CCTV fifteen days to respond to the notice. (*Id.* at 133.) The Commission then voted to issue the notice of violation and to give CCTV fifteen days to respond to the notice. (*Id.* at 140-141; see Exh. 2.)

CCTV's response to the notice of violation (Exh. 14, Letter of January 29, 1987) asserted CCTV's belief that it was fulfilling all its L.O. obligations. Specifically, CCTV stated that of the nine hours L.O. programming per week, 4.5 hours came from Group W, and 4.5 hours was acquired from their affiliated TCI companies in the surrounding suburban area.[11] CCTV further stated that it selected shows

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[11] CCTV and Group W had agreed that each company would produce one-half of the required L.O. programming. Each would then transmit the other's L.O. programming to its subscribers along with its own programming to fulfill their L.O. obligations. The Commission found this plan satisfactory.

from the pool of available suburban L.O. programming it believed would be of interest to its customers in Chicago. (*Id.*) A list of all the L.O. programming presented by CCTV since October 1, 1986 was attached. (*See* n. 9, *supra.*)

At the next Commission meeting on February 10, 1987 (Exh. 12), Ms. Charleston recommended the Commission find CCTV in violation of the Franchise Agreement and impose a fine. (*Id.* at 7.) The Commission heard statements from Diane Minor, an OCC staff member. Ms. Minor testified that the OCC had formulated a formal definition of L.O. (*see* Exh. 14, Memorandum entitled "What is Local Origination," undated). The OCC borrowed the definition of L.O. used by the National Cable Television Association, i.e., "programming . . . which is developed by an individual cable television system specifically for the community it serves." (Exh. 12, p. 8.) The OCC concluded that although Chicago Cable TV/TCI had provided programming produced by Cablenet, an affiliated TCI company in the Chicagoland area, and utilized guests associated with Chicago businesses and institutions, programming had not been produced or telecasted featuring local residents from Areas 1, 4 and 5. (Memorandum, p. 2; Exh. 12, pp. 9-10.) Later in her testimony, Ms. Minor, responding to questions regarding the source of CCTV's programming and the subjects of that programming, stated that CCTV produced its L.O. programs in the studios of one of its affiliates in the Chicago suburbs, and "have utilized Chicago personalities, people connected with Chicago institutions, but Chicagowide, like Roosevelt University or Northern Trust Bank; but not necessarily community residents themselves." (Exh. 12, pp. 11-12.)

Mr. Green, on behalf of CCTV, stated that CCTV "still feel[s] that we are in compliance of what is required by the franchise pertaining to local origination. . . . That is my total response." (*Id.* at 17.)

The Committee than voted to find a violation and to assess CCTV a fine of $750 per day per Area. The notice of assessment stated in part:

> THE CHICAGO CABLE COMMISSION FINDS AS FOLLOWS:
>
> 1. Based on the submission by CCTV/TCI, the programming shown over CCTV/TCI's local origination channels and claimed by CCTV/TCI to satisfy its local origination obligations as Grantees for Areas 1, 4, and 5 "is acquired through [CCTV/TCI's] affiliated TCI companies in the surrounding Chicagoland area" instead of being produced by CCTV/TCI itself. Furthermore, based on the submission by CCTV/TCI, the subjects of the programming are, for the most part, geared to the broad City-suburban Chicagoland areas rather than the communities that CCTV/TCI serves.

(Exh. 3, p. 1.)

This finding was the basis of the Commission's ruling that CCTV was in violation of its L.O. obligations. (*Id.* at p. 2.) CCTV then filed a petition for reconsideration seeking rescission of the notices of violation and assessment. (Exh. 14, Letter of February 24, 1987.) CCTV raised numerous legal challenges to the assessment. First, it claimed that the Cable Communications Policy Act of 1984, 47 J.S.C. § 521 *et seq.* ("Cable Act") prohibits local authorities from mandating how an L.O. channel can be operated. Second, it claimed that the First Amendment prohibits local authorities from regulating the content of local origination programming. Third, CCTV argued that the term "local origination" in the Franchise Agreement is ambiguous and the Committee's definition cannot be the basis for a fine or penalty. Fourth, CCTV claimed it was in compliance with the Franchise Agreement. And finally, the company claimed it had remedied the alleged violation because it had stopped using programming produced by an affiliate in the suburbs and that it had begun producing

all of its L.O. programming within the Chicago city limits. (Exh. 14, Letters of February 24, 1987 and March 9, 1987.)

The Chairman requested proof that CCTV had begun producing all its L.O. programming within the City of Chicago. (*Id.*, Letter of March 4, 1987.) CCTV responded that it and Group W had jointly agreed that Group W would perform all the programming productions on behalf of both companies with the two companies sharing the costs. (*Id.*, Letter of March 6, 1987.) Both companies would have equal input into decisions regarding programming content, use and development of local talent, use of interns, and relationships with various schools in the community. (*Id.*)

The Committee spent most of its March meeting considering the subject of L.O. and CCTV's petition for reconsideration. (Exh. 13, pp. 21205). CCTV argued its position that the Commission's actions really were attempts to regulate the content of their L.O. programming, and that such regulation is impermissible under the First Amendment. (*Id.* at 3739.) The company objected to the Commission's definition of L.O. and the way they came up with it (*id.* at 4245), but agreed to comply with it in the future. (*See, e.g., id.* at 69.)

Chairman Charleston expressed her opinion the Commission's regulations and rules were valid, that CCTV had indeed violated the L.O. requirements of the Franchise Agreement, and that CCTV was still in violation despite its agreement with Group W to produce L.O. programming within Chicago. (*Id.* at 104-115; 175-176; Exh. 14, Memoranda dated March 4, 1987, and March 10, 1987). After long debate and arguments from all sides, the Commission voted to deny the petition to reconsider (Exh. 13 at 137-138) and assessed fines amounting to $60,750 ($750 per day, for 27 days (January 15 to February 11, 1987) times three Areas). (*Id.* at 199-201.) This action brought by CCTV

seeks restitution of the $60,750 fine levied by the Commission.

LEGAL DISCUSSION

CCTV raises several arguments in support of its motion seeking reversal of the order of the Commission assessing a fine of $60,750. Before we can address any of these arguments, we must first understand precisely what the Commission did. The Commission sanctioned CCTV on the basis of three findings: The programs used by CCTV to fulfill its L.O. obligations were (1) produced by an affiliate company (2) in a suburban location and (3) were geared to the broad metropolitan area rather than the City alone. Paragraph 1 of the notice of violation, the Commission's discussions, and the Commission's findings and assessments all concerned these three issues. Accordingly, we will examine the record to see if it supports the Commission's finding that CCTV in fact produced its L.O. programs in Cablenet's suburban studio regarding the metropolitan area rather than the City, and we will examine the law to see if the Commission may legally impose a fine on CCTV for producing such L.O. programming.

1. *Sufficiency of the Evidence*

Our examination of the sufficiency of the evidence need not detain us long. CCTV admitted that it was acquiring its 4.5 hours of L.O. programming from Cablenet. (Exh. 14, Response to Notice of Violation, ¶ 1.) CCTV admitted that the programs were produced in Mt. Prospect. (Exh. 13, pp. 35-36.) And the descriptions of CCTV's L.O. shows provided by CCTV indicate a broader appeal than simply the City of Chicago. (Exh. 14, Response to Notice of Violation.) For example, the show "Illinois Reads" presents authors from throughout the State of Illinois. While this show may be of interest to some Chicago cable customers,

it clearly is not focused on Chicago.[12] This is enough evidence to support the Commission's findings. The tougher question is whether the Commission may legally impose the fines.

2. *Franchise Agreement*

CCTV argues that the Commission's finding of a violation on the ground CCTV acquired L.O. programming from a third party (here Cablenet) conflicts with the Franchise Agreement. Attachment G1 to the Franchise Agreement provides "local origination falls solely under the control of the cable operator and/or its contractors." The Commission implicitly concedes that the grantees can hire third parties to produce their L.O. programming (or at least the Commission does not now attempt to support its finding to the contrary). (Brief in Opposition, p. 17.) Since the Commission does not rely on CCTV's use of Cablenet for production purposes in its attempt to bolster its case, neither shall we. We shall proceed to examine the legality of the two remaining bases for the fine: the production outside the City and the fact the shows were geared to the broad metropolitan area.

CCTV asserts that the Franchise Agreement does not require that the L.O. programming be "geared" to the City or specific communities within the City. The Commission interpreted the Franchise Agreement to require the content of CCTV's L.O. programming be specifically

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[12] CCTV claims there is no evidence in the record that any of the Commissioners had ever viewed any of the CCTV's L.O. programming. It argues that if the Commission never saw any of CCTV's L.O. programming, they could not rationally have found the subjects geared to the broad City/Suburban areas rather than the City itself. The flaw in this argument is that CCTV was asked to provide copies of its L.O. programs (Exh. 9, p. 131), but it failed to do so. Even after a notice of violation, CCTV merely sent written descriptions of its programming to the Commission. If the Commission did not view CCTV's L.O. shows, it was solely CCTV's fault.

geared to City residents as opposed to suburban residents. We think the Commission's interpretation of the "local origination" requirement is a reasonable one and we see no error in applying it. Perhaps the procedure by which the Commission went about devising their interpretation of "local origination" was flawed (a contention we consider, *infra*), but we cannot say the Commission's definition is contrary to either the Franchise Agreement or Chapter 113.1. Therefore, we find no basis in the Franchise Agreement to overrule the Commission's interpretation.

The next argument CCTV makes based on the Franchise Agreement is that the Commission violated the Franchise Agreement by giving CCTV only 15 days to respond to the notice of violation. Section 29.2 allows the Commission to shorten the response period (normally 30 days) if it determines the violation is of such a serious nature that a shorter period is warranted. CCTV claims there is no evidence in the record supporting a determination that the violation was serious.

At the January meeting (the one at which the notice of violation was issued) the Commission found the violation sufficiently serious to warrant a shortened response time. Ms. Charleston stated that the obligation to telecast L.O. programming began in October 1986, and since CCTV had been in violation since that time, it was necessary to hurry the enforcement proceedings along. (Exh. 11, pp. 131, 136.) The shorter time period was also necessary to ensure that the Commissioners had enough time to review CCTV's submission in response before the next monthly meeting. (*Id.* at 132.) In any event, CCTV neither objected to the shortened response period nor requested an extension of time while before the Commission. In general, issues or defenses not presented in an administrative hearing may not be raised for the first time on appeal. *Village of Hillside v. John Sexton Sand & Gravel Corp.*, 113 Ill.App.3d 807, 69 Ill.Dec. 612, 447 N.E. 2d 1047 (1st Dist.1983);

Rackow v. Illinois Human Rights Commission, 152 Ill.App. 3d 1046, 105 Ill.Dec. 826, 504 N.E.2d 1344 (2d Dist.1987). Hence, any violation of the time-to-respond provision of the Franchise Agreement (and we expressly do not find such a violation occurred) has been waived.

The final argument CCTV raises regarding a violation of the Franchise Agreement is that the amount of the fine is excessive. The Franchise Agreement establishes that the Commission may assess monetary sanctions up to $750 per day for violating any term of Chapter 113.1 or the Franchise Agreement. (Section 29.6.) The Franchise Agreement sets forth three principles which the Commission shall consider in determining the appropriate amount of such sanctions:

> a) Such monetary penalties, fines and other monetary sanctions shall exceed the financial benefits to Grantee's delaying or failing to comply with the applicable requirement;
>
> b) Even where such benefits are not easily discernible, such monetary penalties, fines and other monetary sanctions shall be high enough to have a significant deterrent effect on Grantee;
>
> c) Such monetary penalties, fines and other monetary sanctions shall be sufficient to protect the City and other affected parties against loss of revenue resulting from Grantee's violations.

Id.

CCTV argues that the Commission failed to consider the monetary savings or the deterrent effect of the fine. We conclude the record adequately supports the Commission's imposition of the maximum fine. We conclude the record adequately supports the Commission's imposition of the maximum fine. At tne Commission's February 1987 meeting, the Commission voted to find a violation and assess

a fine. When the issue of the appropriate amount of the fine arose, Commission Jones stated:

> Well, owing to the evident position taken by the respondent that they propose no changes in their attempts to comply, I would suggest that and move that the maximum fine of $750 a day be imposed.

Exh. 12, p. 26. Commissioner Delgado seconded that motion. (*Id.*) Clearly, the Commissioners were concerned that a lesser fine would provide no incentive for CCTV to comply with the Commission's order promptly.[13] While the discussion was abbreviated, it is sufficient to demonstrate the Commissioners were not arbitrarily imposing the maximum penalty.

3. *First Amendment*

CCTV next asserts that the Commission's imposition of a fine based on the subject matter of its L.O. programming (i.e., it was geared to the broad City/Suburban metropolitan area rather than the community served by the cable operator) violated the First Amendment. Relying on *Quincy Cable TV v. F.C.C.*, 768 F.2d 1434 (D.C.Cir.1985), *cert. denied sub. nom., N.A.B. v. Quincy Cable TV, Inc.*, 476 U.S. 1169, 106 S.Ct. 2889, 90 L.Ed.2d 977 (1986) and *Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396 (9th Cir.1985), *aff'd and remanded*, 476 U.S. 488, 106 S.Ct. 2034, 90 L.Ed.2d 480 (1986), CCTV argues that the City's examination of the subject matter which CCTV, in the exercise of its editorial discretion, chose as its L.O. programming constituted impermissible content regulation. CCTV views the Commission's actions as violative of the First Amendment just as clearly as if the City imposed a fine on the *Chicago Tribune* for printing

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[13] CCTV makes much of the fact that the total fine amounted to $60,750. However, it must be remembered that the fine was $20,250 *per area*. The only reason the fine was so large was because CCTV received the CATV franchise for three of the five areas of the City.

articles of which it did not approve. (*See Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974).)

The Commission, on the other hand, disputes CCTV's contention that it required the cable operator to produce L.O. programming only on subjects the Commission decreed appropriate. To the contrary, the Commission argues it merely determined that CCTV's L.O. programming should relate to local (i.e., Chicago) subjects. This, the Commission concludes, is wholly permissible under the First Amendment.

There is no doubt that cable operators engage in conduct which implicates First Amendment issues. *Preferred Communications*, 106 S.Ct. at 2037; *Quincy Cable*, 768 F.2d at 1444. The strength of that protection is open to some debate. Different communications media are treated differently for First Amendment purposes. *Preferred Communications*, 106 S.Ct. at 2038 (Blackmun, J., concurring). Government regulation of newspapers is extremely suspect, *see Miami Herald, supra*, while government regulation of broadcasters is more readily tolerated. *See Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969). The Supreme Court has not yet determined the appropriate standard for review for a First Amendment challenge of government regulation of cable television. *See Preferred Communications*, 106 S.Ct. at 2038 (Blackmun, J., concurring).

The lower courts have reached varying results in determining the degree of First Amendment protection to be accorded cable television operators. Some courts have held that cable broadcasting is very different from newspaper publishing where very little government regulation is constitutionally permissible. *E.g., Community Communications Co., Inc. v. City of Boulder*, 660 F.2d 1370 (10th Cir.1981), *cert. dismissed*, 457 U.S. 1001 102 S.Ct. 2287, 73 L.Ed.2d 1296 (1982). Other courts have determined that

cable television is quite distinct from the broadcast media, where substantially more government regulation is constitutionally permissible. *E.G., Quincy Cable, supra.* When the Supreme Court eventually decides this issue, it probably will adopt an intermediate approach. It probably will recognize that the strict limits placed on the broadcast media by the physical constraints of the electromagnetic spectrum do not exist in the realm of cable television. *Quincy Cable*, 768 F.2d at 1448. On the other hand, the Court will probably recognize that, at least in some instances, cable television possesses natural monopoly characteristics that warrants greater governmental regulation. *See Omega Satellite Products Co. v. City of Indianapolis*, 694 F.2d 119, 127-128 (7th Cir.1982).

We conclude that the appropriate framework for analysis in this case is provided by *United States v. O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968):

> a government regulation is sufficiently justified (1) if it is within the constitutional power of the Government; (2) if it furthers an important or substantial governmental interest; (3) if the governmental interest is unrelated to the suppression of free expression; and (4) if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

See Erie Telecommunications, Inc. v. City of Erie, Pa., 659 F.Supp. 580, 599-600 (W.D.Pa.1987); *Berkshire Cablevision of Rhode Island, Inc. v. Burke*, 571 F.Supp. 976 (D.R.I.1983).

CCTV seems to focus its argument on the second and fourth elements of the *O'Brien* test and so shall we.[14]

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[14] The first requirement, that the government possess the power to regulate cable television, is satisfied. The cable television medium has not historically been insulated from regulation, as has the newspaper

CCTV argues there is no important or substantial governmental interest furthered by the Commission's regulation of the content of the L.O. programming. CCTV argues that the disruptive and aesthetic concerns enunciated in *Omega Satellite*[15] are not implicated here. This may be true, but the Commission articulates other governmental interests. The Commission argues the L.O. requirement provides an outlet for community expression and increases the public's choice of programming. (Response Brief at 23.) In addition, Chapter 113.1 states that the development of cable television in general is a means for improving communications between and among the citizens and public institutions of the City, and serves as a vehicle for the participation of all segments of the City, including minorities, in the economic opportunities created by cable television operations. § 113.1-2.[16] Even the Court in *Quincy*

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industry. *Eric*, 659 F.Supp. at 600 and cases cited therein. The third requirement, that the governmental regulation be unrelated to the suppression of free speech, is also satisfied. There is no evidence in the record, nor any argument from CCTV, that the Commission is trying or desires to suppress CCTV's rights of free expression. The Commission merely wants CCTV's L.O. programming to concern Chicago, and only Chicago.

[15] In *Omega Satellite*, the Seventh Circuit held that a municipality may regulate entry into the cable television market because cable television signals are transmitted through coaxial cable strung along telephone poles and through underground ducts. Because a municipality clearly has an interest in maintaining the aesthetic purity of its territory (*see Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981)), a municipality may limit the number of wires traversing the telephone poles within its boundaries. Similarly, a municipality may regulate the construction of new cable systems which inevitably results in ripping up streets or lawns.

[16] The Commission's insistence that all L.O. programming be produced within the City of Chicago directly fosters this interest. City residents are more apt to participate in L.O. programming, and to take an interest in that programming, if the shows are produced in the City. Production within the City will provide jobs for City residents (even if the number is small) and will provide opportunities for students study-

Cable recognized "the common wisdom that the goal of encouraging 'localism' qualifies as 'important or substantial.'" 768 F.2d at 1454. The important qualities embodied in the term "localism" (community pride, cultural diversity, etc.) may not be furthered enough simply by the availability of local broadcast television stations for retransmission over cable systems, but may require original cable programming specifically concerning the locality and directed at that locality's residents. The Commission's L.O. requirement helps foster those interests by insisting that those cable companies operating within the City of Chicago produce their L.O. programming within the City of Chicago and designed specifically for City residents. Therefore, we find the Commission's L.O. regulation furthers important and substantial governmental interests.

The final element of the *O'Brien* test is that the government regulation be an incidental restriction no greater than is essential to the furtherance of that interest. We find this element is satisfied. The Commission does not require CCTV to transmit across its cable system any particular editorial viewpoint, any particular show, or even any particular kind of show. Hence, the Commission's rule is both viewpoint and content neutral. CCTV may telecast any program, whether it be spots, entertainment, politics, or whatever, so long as it relates to Chicago. Contrary to CCTV's assertion, this rule does not divest CCTV of programming control; it merely places a minor restriction on the exercise of that control.

CCTV's argument that its L.O. programming is or should be subject to no control is simply wrong. Even before the Commission clarified the meaning of "local origination," CCTV was subject to constraints like the ones it now challenges. If CCTV were to have telecasted programming that originated in Denver in fulfillment of its L.O. obli-

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ing television and radio broadcasting to gain experience through internship programs.

gations in Chicago, it could not have successfully objected on the grounds of "content regulation" when the Commission imposed sanctions. Yet the Commission would be imposing sanctions based on the content of the L.O. programming just as surely as it is here. (Of course, no one would claim that a program featuring skiing in the Rocky Mountains should satisfy a Chicago cable operator's L.O. requirements, so that case is much easier.) The ruling by the Commission here regulates content to no greater extent than if it ruled Rocky Mountains ski shows do not satisfy CCTV's L.O. obligations. The difference is merely one of degree—here the Commission drew a bright line at the Chicago city limits. We find the requirement that CCTV's L.O. programming focus on Chicago and not the suburbs is not an impermissible content regulation.

4. *Cable Act*

Congress passed the Cable Communications Policy Act of 1984, Pub.L. 98-549, 98 Stat. 2780, in part to establish a national policy concerning cable communications and to establish guidelines for the exercise of federal, state and local authority with respect to the regulation of cable systems. Cable Act sec. 601, 47 U.S.C. § 521(1), (3). Section 624 of the Cable Act, 47 U.S.C. § 544, governs the regulation of services, facilities, and equipment. The relevant portion provides as follows:

> In the case of any franchise in effect on the effective date of this subchapter [60 days after October 30, 1984], the franchising authority may, subject to section 545 of this title [concerning modification of franchise obligations], enforce requirements contained within the franchise for the provision of services, facilities, and equipment, whether or not related to the establishment or operation of a cable system.

47 U.S.C. § 544(c). Section 544(c) is limited by section 544(f), which provides that "[a]ny Federal agency, State, or franchising authority may not impose requirements re-

garding the provision or content of cable services, except as expressly provided in this subchapter." The Cable Act further provides that a franchising authority "may enforce any requirement contained within the franchise . . . for broad categories of video programming or other services." 47 U.S.C. § 544(b)(2)(B).

CCTV argues that the Commission's requirement that CCTV's L.O. programming be "geared to . . . communities that CCTV/TCI services" is neither contained within the franchise nor is a regulation concerning a broad category of video programming. We reject CCTV's arguments.

As we held earlier in this opinion, the Commission's definition of "local origination" was a reasonable one. We thus interpret the Franchise Agreement as requiring L.O. programming geared to the specific community served by CCTV, or to the City of Chicago rather than the metropolitan area. Our interpretation of the Franchise Agreement therefore necessarily defeats CCTV's argument; the requirement of local City of Chicago programming is "contained within the franchise" and may be enforced by the Commission.

CCTV's second argument is more difficult. We have found no judicial decision discussing the meaning of "broad categories of video programming." CCTV argues that the Commission's requirements violates the Cable Act because it is specific content regulation of programming. We agree with CCTV that specific regulation of the content of cable programming would violate the Cable Act. So if the Commission insisted that CCTV cover the Taste of Chicago (an annual gastronomic festival) or the Prep Bowl (an annual high school football game between the best Public League team and the best Catholic League team), for example, we probably would have to conclude that the Commission overstepped its authority.

However, the Commission's actions were not nearly so intrusive. The Commission merely ordered that CCTV

present programming on topics specifically relating to the City of Chicago rather than the whole Chicagoland area. The legislative history of the Cable Act indicates that Congress intended the phrase "broad categories of video programming" to mean programming such as "children's programming; programming in a particular foreign language; programming which is primary interest to a particular minority group; news and public affairs programming; [or] sports programming." H.Rep. No. 934, 98th Cong., 2d Sess., pp. 68-69, *reprinted in* 1984 U.S. Code Cong. & Admin.News 4655, 470506. If a franchising authority may, consistent with the Cable Act, insist on programming of particular interest to a specific minority group, then surely a franchising authority may insist on programming with less constraints, i.e., programming of interest to a city or a portion of that city. Accordingly, we find no violation of the Cable Act occurred when the Commission fined CCTV for not programming L.O. shows produced especially for residents of the City.

5. *Due Process*

CCTV next argues that its due process rights were violated because the Commission failed to give adequate notice of a violation. It is axiomatic that a governmental entity must give a person adequate notice prior to deprivation of life, liberty, or property. *See, eg., Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). A notice is adequate if it apprises the affected individual of, and permits adequate preparation for, an impending hearing. *Memphis Light, Gas and Water Division v. Craft*, 436 U.S. 1, 13, 98 S.Ct. 1554, 1562, 56 L.Ed.2d 30 (1978), *quoting Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950). We find the notice given to CCTV was adequate to apprise them of the nature of the violation with which they were being charged.

The notice of violation stated that CCTV had failed to document how its L.O. programming was actually locally produced. While this notice did not define "locally produced," CCTV knew or should have known that the Commission wanted documentation indicating that CCTV produced its L.O. programming within the City of Chicago. *See* Exh. 9 at pp. 129-131. Mr. Green personally acknowledged that CCTV should produce its L.O. programming in Chicago and knew or should have known that the Commission wanted the L.O. programming produced in Chicago. (*See also* Exh. 14, Letter of November 17, 1986).

CCTV also argues that the notice of violation charged CCTV only with a failure to document compliance and not with a failure to comply. However, CCTV does not claim it could prove compliance other than via documentation. If CCTV had live witnesses to prove its compliance, then it may have been prejudiced by the Commission's request for documentation only. But here, CCTV's failure to document compliance is tantamount to a failure to comply. Therefore, we see no error in the Commission's issuance of a notice of assessment based on a substantive violation despite the earlier notice of violation based on a failure to document.

CCTV next argues that prior to January 13, 1987, CCTV was not given notice that the Commission would consider issuing a notice of violation against CCTV at the January meeting, and that at that meeting, the Commission refused to allow CCTV to speak or make a presentation. Both these arguments must fail. CCTV has provided no support for its argument that it was entitled to notice and an opportunity to speak before it received a notice of violation. Normally, a governmental body must give notice before depriving someone of their property, not before issuing them a notice of violation.[17] CCTV had no constitutional

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[17] Indeed in some circumstances, a governmental body may seize prop-

right to be informed of the impending issuance of a notice of violation; so long as they had adequate notice prior to actual deprivation, the Constitution's requirements are satisfied. The same holds true for the right to speak; as long as the Commission gave CCTV an opportunity to make a presentation or speak on its own behalf prior to actual deprivation, there has been no due process violation.

CCTV's final due process argument is that the Commission was not a fair and impartial tribunal. Due process prohibits a biased or partisan tribunal from hearing one's case. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242, 100 S.Ct. 1610, 1613, 74 L.Ed.2d 182 (1980). However, CCTV does not provide any evidence of bias or partisanship by the Commission. The Committee's chair, Ms. Charleston, clearly as adamant in her belief that CCTV was in violation. Even if she was biased (on which we express no view), she did not vote on any of the resolutions important to this case. The remaining Commissioners all seemed to be conscientious and fair. They read CCTV's response, listened to CCTV's comments, allowed CCTV to file a petition for reconsideration, and listened to CCTV's presentation on that petition. We cannot find the Commission to have been biased or partisan. Accordingly, we find no violation of due process.

6. *Equal Protection*

CCTV's final argument is that it was deprived of its rights afforded by the Equal Protection Clause of the Fourteenth Amendment. CCTV argues that it and Group W were jointly and severally responsible for producing L.O. programming, and that Group W telecasted four and one-half hours of programming acquired from Cablenet just like CCTV did. Yet, only CCTV got slapped with a fine. Relying on *Ciechon v. City of Chicago*, 686 F.2d 511 (7th

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erty even before giving notice, if the post- deprivation procedures are adequate. *See, eg., Tavarez v. O'Malley*, 826 F.2d 671, 674 (7th Cir.1987).

Cir.1982), CCTV concludes its rights to equal protection had been violated.

In *Ciechon*, the Seventh Circuit held that a municipality violates the Equal Protection Clause when it distinguishes between two similarly situated individuals for the imposition of discipline, and when it does so on arbitrary or irrational grounds.

The facts in this case do not support an Equal Protection violation. Although CCTV and Group W were jointly and severally responsible for providing nine hours of L.O. programming, an agreement between the two companies explicitly apportioned responsibility between themselves. In *Ciechon*, by contrast, the two paramedics had not divided up their responsibilities and each was equally responsible for the patient's welfare. While the Commission could have sanctioned Group W and at one time stood ready to do so, it chose to sanction only CCTV. The Commission's decision to sanction only CCTV was neither arbitrary nor irrational because CCTV was responsible for producing those hours of L.O. programming which actually violated the Franchise Agreement. CCTV's Equal Protection rights were not violated.

CONCLUSION

Plaintiffs' motion for judgment is denied. Defendants' cross- motion for summary judgment is granted. Judgment shall be entered for the Chicago Cable Commission and the City of Chicago.

Exhibit G

LOCAL ORIGINATION

The following local origination plan is a joint effort of all Grantees operating within the City which commits a total of $6,000,000.00 to develop local origination programming. Exhibit G and its Attachment G1 is not only applicable to Area 1, but upon the acceptance of the Franchise Agreement for Area 1, shall replace the Exhibit Gs for the Franchise Agreements for Areas 2,3,4, and 5. Unless otherwise specifically stated herein, the Grantees for Areas 1,2,3,4, and 5 (the "grantees") shall be jointly and severably liable for the obligations stated herein.

1) *Number of Channels* - During the term of the Agreement, the grantees jointly shall provide and program one (1) full-time non-alphanumeric local origination channel. In addition, the Grantee shall provide and program two (2) alphanumeric local origination channels. The Grantee may provide additional local origination channels on its cable television system; provided, however, that in no event shall the minimum weekly hours of non- alphanumeric programming as set forth in Attachment G1 be shifted from the non-alphanumeric local origination channel to any additional local origination channel.

2) *Staff* - The grantees shall provide the level and quality of staffing necessary to develop and produce programming to fulfill their local origination requirements.

3) *Studios and Equipment* - The grantees shall provide in the year so designated and throughout the term of the Agreement the studio, facilities and equipment set forth in attachment G1 or a studio, facilities and equipment of equal or greater performance or capabilities.

4) *Production* - During Years 1 through 5, the grantees shall, at a minimum, for the number of hours per week set forth in Attachment G1, locally produce and cable-

cast its local origination programming (excluding access, alphanumeric or satellite delivered services) on its non-alphanumeric local origination channel. Thereafter, for the term of the Agreement, the grantees shall, at a minimum, produce and cablecast such local programming for the number of hours set forth in Attachment G1 for Year 5.

ATTACHMENT G1

JOINT LOCAL ORIGINATION PROPOSAL OF CHICAGO CABLE OPERATORS

The cable operators operating in the City of Chicago are committed to producing quality local origination programming. It is the strong belief of these cable operators that a centralized approach to the production of local origination programming is in the best interests of the City, the cable companies and cable subscribers. It is also the belief of these operators that local origination programming should supplement, but not duplicate, the other locally produced programming that is available on the operators' cable systems. Besides local origination programming, the other requirements imposed upon the operators for locally produced programming are in the areas of public, government and commercial or leased access. While public access is under the control of the Chicago Access Corporation (CAC), government access under the control of the City, and commercial or leased access under the control of third parties, local origination falls solely under the control of the cable operator and/or its contractors.

It is not the intent of the cable operators to compete with or duplicate programming produced by the CAC, the City or commercial access users. Instead the operators want to compliment these other forms of local programming with programs that are non-duplicative, able to fill the void not filled by other local programs and able to attract and retain cable subscribers. The cable operators are jointly committing $6,000,000.00 to underwrite their local origination efforts in Chicago.

With these objectives in mind, the Chicago cable operators propose the following joint local origination proposal:

1. LOCAL ORIGINATION CHANNELS

During the term of the Agreement, the cable oper-

ators will jointly provide one full-time non-alphanumeric local origination channel. In addition, the individual operators in Areas 1,2,3,4, and 5 will be responsible for programming two alphanumeric local origination channels for each franchise area.

2. STAFF

During the term of the Agreement, the cable operators will provide the level and quality of technical, engineering, programming and administrative staff necessary to develop and produce programming to fulfill their local origination requirements.

3. LOCAL TALENT

The combined local origination effort for Areas 1,2,3,4 and 5 will include substantial efforts by the cable operators to utilize and develop local talent for local origination purposes. In addition, the use of full-time and part-time internship programs for local residents should increase the local residents potential for employment as demand requires. Through their combined local origination efforts, the cable operators will seek to establish ongoing relationships with local high schools, colleges, and other educational institutions for an accessible pool of individuals with an interest in local origination.

4. PRODUCTION

During Years 1 through 5, the cable operators will jointly provide, at a minimum, the number of hours per week set forth below to locally produce and cablecast their local origination programming (excluding access, alphanumeric, or satellite delivered services) on the non-alphanumeric local origination channel.

Hours of Production	
*Yr. 1	9
Yr. 2	12
Yr. 3	15
Yr. 4	20
Yr. 5	20

Thereafter, the cable operators will at a minimum, produce and cablecast 20 hours per week of local programming. The cable operators will expend the necessary amount of funds within their $6,000,000.00 overall local origination commitment to produce the above stated hours per week of quality local origination.

5. LOCAL ORIGINATION FACILITIES AND EQUIPMENT

Under this joint local origination plan, the cable operators will jointly provide a centralized local origination studio facility and mobile equipment. This central facility and accompanying equipment will be in place prior to the Year 1 triggering date so that the operators can meet their local origination commitments on schedule. The central facility will be of sufficient square footage to house all necessary directly-related facilities such as: editing, preparation, storage, and control room areas as well as related office areas required for local origination programming production purposes. The following pages detail the types of facilities and equipment proposed for a central local origination studio, mobile equipment, post-production facility, screening facility, master control and central maintenance facilities. The esti-

* For purposes of this local origination proposal, Year 1 will commence on the first anniversary of the delivery of service to all the franchise areas or upon the second anniversary of the delivery of service to any one franchise area, whichever occurs first.

mated cost of the facilities and equipment is $1,200,000.00 and the anticipated costs of leasehold improvements is $300,000.00.

RESOLUTION 54 February 10, 1987

WHEREAS, on January 13, 1987, the Chicago Cable Commission adopted a resolution authorizing the issuance of a Notice of Violation to Chicago Cable TV/TCI ("CCTV/TCI") in its capacities as Grantees for Areas 1, 4, and 5; and

WHEREAS, the subject of that Notice, as authorized by the Commission was CCTV/TCI's local origination programming obligations; and

WHEREAS, the Chairman/Cable Administrator issued the Notice to CCTV/TCI on January 15, 1987; and

WHEREAS, CCTV/TCI submitted a written response dated January 29, 1987; and

WHEREAS, CCTV/TCI has not requested an opportunity to be heard, as permitted by Section 29.2 and 29.3 of the Franchise Agreement.

THE CHICAGO CABLE COMMISSION FINDS AS FOLLOWS:

1. Based on the submission by CCTV/TCI, the programming shown over CCTV/TCI's local origination channels and claimed by CCTV/TCI to satisfy its local origination obligations as Grantees for Areas 1, 4, and 5 "is acquired through [CCTV/TCI's] affiliated TCI companies in the surrounding Chicagoland area" instead of being produced by CCTV/TCI itself. Furthermore, based on the submission by CCTV/TCI, the subjects of the programming are, for the most part, geared to the broad City-suburban Chicagoland areas rather than the communities that CCTV/TCI serves.

2. Based on the foregoing, the Commission finds one continuing violation of the local origination obligations for each of the three franchise areas 1, 4, and 5, *i.e.*, a total of three continuing violations.

3. Pursuant to Sections, 29.3 and 29.6 of the Franchise Agreement, the Commission deems imposition of fines appropriate. Accordingly, the Commission hereby imposes upon CCTV/TCI, a separate fine of $750.00 per day for each of its three franchise areas, beginning on January 16, 1987 and continuing as long as the violations continue.

4. The Chairman/Cable Administrator is directed to prepare and issue to CCTV/TCI a Notice of Assessment, in accordance with Section 29.3 of the Franchise Agreement. The Notice of Assessment shall state an amount to be assessed initially and shall provide a date of at least fifteen days after receipt of said Notice upon which initial payment for the violations is due.

5. Due to the continuing nature of the violations, the Commission acknowledges that the fines will be continuing ones, running until CCTV/TCI remedies the violations. CCTV/TCI is directed to submit written proof of remedies to the Commission should CCTV/TCI, in the future, wish the Commission to rule on whether a remedy has been achieved.

6. The Chairman/Cable Administrator is directed to issue supplementary Notices of Assessment to CCTV/TCI on a regular basis, until such time as the Commission deems the violation to have been remedied.

February 10, 1987
ADOPTED

Supreme Court, U.S.
FILED
DEC 19 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-747

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CHICAGO CABLE COMMUNICATIONS, SOUTH CHICAGO CABLE, INC., and CABLE OF CHICAGO,

Petitioners,

v.

CHICAGO CABLE COMMISSION and CITY OF CHICAGO,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the City of Chicago, without offending the First Amendment to the United States Constitution, may impose fines upon cable franchise operators for failing to honor their franchise commitments to air 4½ hours per week of locally produced, locally focused programming.

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CHICAGO CABLE COMMUNICATIONS, SOUTH CHICAGO CABLE, INC., and CABLE OF CHICAGO,

Petitioners,

v.

CHICAGO CABLE COMMISSION and CITY OF CHICAGO,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This case concerns the validity of fines levied by a municipality against a cable franchise operator for failing to honor its commitment to air 4½ hours of locally produced, locally focused programming. In 1982 the City of Chicago ("City") adopted the Chicago Cable Commun-

ications Ordinance (Chapter 113.1 of the Municipal Code). The ordinance created the Chicago Cable Commission to regulate the new cable industry. Chapter 113.1 divides the City into five areas and provides for the franchising of cable television systems within those areas. The petitioners here—all affiliates of Telecommunications, Inc. ("T.C.I."), who collectively do business as Chicago Cable TV ("CCTV")—were awarded franchises for three of the five areas. A different company, Group W Cable, was awarded the franchises for the other two areas. *Chicago Cable Communications v. Chicago Cable Commission*, 678 F. Supp. 734, 736 (N.D. Ill. 1988).

As set forth more fully in the district court's opinion below, the franchise agreement entered into by the petitioners required them to produce and air a certain amount of "local origination" ("l.o.") programming each week. In the period at issue in this case, petitioners committed themselves to 9 hours of local origination programming per week on one of their 60 channels. The petitioners and Group W subsequently agreed, with the approval of the City, to divide this responsibility: Group W and CCTV would each produce 4½ hours of l.o. programming, and each would air the other's 4½ hours. *Id.* at 736-37. Group W honored its commitment, but petitioners did not. *Id.* at 748. Instead, they aired programming produced in the suburbs by other TCI affiliates. Some of this programming was of interest to Illinois residents or residents of the Chicago metropolitan area, but the district court agreed with the respondents' conclusion that the petitioners did not show that the programming was geared to their local audience, as required by the agreement. *Id.* at 742.

The Cable Commission, after extensive discussions and correspondence with the petitioners, found that they had

failed to satisfy their "local origination obligations as Grantees for Areas 1, 4 and 5" in that they were airing programming obtained through other TCI affiliates in the surrounding area rather than producing their own programming locally. The Commission also found, based on petitioners' own submissions to it, that "the subjects of the programming are, for the most part, geared to the broad City-suburban Chicagoland areas rather than the communities that CCTV/TCI serves." *Id.* at 742. The Commission imposed fines of $60,750 on the petitioners. *Id.*

The petitioners challenged those fines in the United States District Court for the Northern District of Illinois. In their complaint they made a number of challenges to the fines based, *inter alia*, on due process, equal protection and First Amendment grounds. The district court upheld the fines on all bases. Petitioners then appealed to the United States Court of Appeals for the Seventh Circuit, again pressing due process, equal protection and First Amendment theories. The Seventh Circuit likewise affirmed on all points. 879 F.2d 1540 (7th Cir. 1989).

Before this Court, petitioners raise only one issue: whether the Seventh Circuit erred by applying the standard of review set forth in *United States v. O'Brien*, 391 U.S. 367 (1968), to resolve the petitioners' First Amendment challenge to the fines.

REASONS FOR DENYING THE WRIT

I.

THE CITY'S IMPOSITION OF FINES ON PETITIONERS FOR FAILING TO PRODUCE PROGRAMMING WITHIN THE CITY DOES NOT IMPLICATE THE FIRST AMENDMENT.

The petitioners were fined for failing to produce their quota of local programming in the City of Chicago. That is a finding they have never contested. And that finding, as the Seventh Circuit held, was "the true basis for the fine." 879 F.2d at 1547.

The Seventh Circuit was quite explicit in its finding that the petitioners' failure to produce the programming locally, as they had promised to do, was the basis for the fines against them:

> The franchise agreement clearly envisioned local production, the notice of violation was based on the same requirement, and the ultimate notice of assessment premised the violation on local production, although "[f]urthermore" criticizing CCTV's suburban-type subject matter. That the lack of Chicago production was the true basis for the fine is manifested as well by the parties' subsequent conduct at the hearing on CCTV's motion to reconsider. After the assessment occurred, CCTV presented a plan to the Commission in which CCTV and Group W would jointly produce their local origination programming at a local Chicago facility, rather than in Mount Prospect, the site of the programming for which CCTV had been fined. Based on this proposal the Commission decided to withhold imposition of further fines until the new programming was produced. No mention was even made as to the suburban content of the programming. This

> further highlights the fact that CCTV was fined for non-compliance with the local production requirement rather than for suburban-oriented content, as shown in the notice of violation.

879 F.2d at 1547.

This basis for the fines does not implicate the First Amendment in any way. Even the petitioners concede as much by failing to argue the point in their "Reasons for Granting the Writ." Indeed the only references they make in the Petition to their failure to produce programming locally are in the "Questions Presented" and "Statement of the Case". The point is not discussed at all among the reasons for granting the writ.

Because the fines were imposed for valid reasons that do not implicate the First Amendment, there is no reason to review the Seventh Circuit's discussion of the standard for evaluating First Amendment challenges to cable regulations, which is merely *dicta*. Accordingly, the writ should be denied.

II.

THE SEVENTH CIRCUIT'S ANALYSIS OF FIRST AMENDMENT CONCERNS IN THIS CABLE REGULATION CASE FOLLOWS THIS COURT'S TEACHINGS AND IS CONSISTENT WITH ANALYSES APPLIED BY OTHER FEDERAL COURTS IN COMPARABLE CASES.

Although it did not need to do so to sustain the district court's decision, the Seventh Circuit nevertheless reviewed and approved the lower court's conclusion that the City was not constrained by the First Amendment from imposing fines on petitioners for failing to produce 4½ hours of programming, geared to their local audience. Both

lower courts used the standard of review set forth in *United States v. O'Brien*, 391 U.S. 367 (1968).[1]

The petitioners do not challenge how the Seventh Circuit applied the *O'Brien* criteria to the facts of this case, and so there is no need to repeat that analysis here. Their only quarrel is with the use of that test. Yet the test's application in the cable context is nothing new.

This Court itself cited *O'Brien* in the cable regulation context: "where speech and conduct are joined in a single course of action, the First Amendment values must be balanced against competing societal interests." *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 495 (1986) (citations omitted). In addition, lower courts have consistently applied *O'Brien* in reviewing a variety of cable regulations. *See e.g. Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 2014 (1988); *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986) (FCC rules requiring cable systems to carry certain local broadcast station signals); *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977) (FCC rules prohibiting cable operators from devoting more than 90 percent of cablecast hours to movie and sports programming and prohibiting advertisements on pay cable channels); *Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396 (9th Cir. 1985), *aff'd on other grounds*, 476 U.S. 488 (1986) (municipal policy

[1] "[A] government regulation is sufficiently justified [1] if it is within the constitutional power of the Government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged first amendment freedoms is no greater than is essential to the furtherance of that interest." 391 U.S. at 496, cited at 879 F.2d at 1548.

limiting each area of the city to a single cable franchisee); *Erie Telecommunications v. City of Erie*, 695 F. Supp. 580 (W.D. Pa. 1987), *aff'd on other grounds*, 853 F.2d 1084 (3rd Cir. 1988) (upheld requirements that cable operators set aside "access channels" for use by the public); *Berkshire Cablevision of Rhode Island v. Burke*, 571 F. Supp. 976 (D.R.I. 1983), *vacated as moot*, 773 F.2d 382 (1st Cir. 1985); *Carlson v. Village of Union City*, 601 F. Supp. 801 (W.D. Mich. 1985) (upheld revocation of a cable operator's franchise). Thus, the Seventh Circuit's use of the *O'Brien* test in this cable case is consistent with how other federal courts are approaching this issue.

In non-cable contexts, where free speech was involved, this Court has also used the *O'Brien* test. For example, in *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984) this Court held that an ordinance that prohibited the posting of signs on public property did not violate the First Amendment. This Court applied *O'Brien* after concluding that the ordinance was viewpoint neutral. The Court emphasized that the ordinance had been enforced in an even-handed manner and that it was not designed to suppress certain ideas. This Court also noted that the text of the ordinance was neutral toward any speaker's point of view. *Id.* at 804-05. Thus, the Court applied the *O'Brien* framework, even though the sign ban prohibited a certain manner of communication. *Id.* at 803.

Like the ordinance in *Taxpayers for Vincent*, the local origination requirement is viewpoint neutral, as the courts below determined. The Commission did not require CCTV to transmit across its cable system any specific program, kind of show, or editorial viewpoint. 879 F.2d 1540, 1551; 678 F. Supp. 734, 746. Moreover, the l.o. requirement does not "regulate speech in ways that favor some viewpoints

or ideas at the expense of others." *Taxpayers for Vincent*, 466 U.S. at 804.

The test used in *O'Brien* is, as this Court recently reasserted, not essentially different from the test traditionally used to evaluate restrictions on the time, place or manner of protected expression. *Ward v. Rock Against Racism*, 109 S. Ct. 2746, 2757 (1989). This Court has used that test to judge the constitutionality of regulations, even though the regulations have had some impact on free expression. So long as a regulation is "viewpoint neutral" and designed to serve substantial governmental purposes "not related to the suppression of free expression," some kind of balancing of the governmental interest against the private speech concerns is appropriate. *See Texas v. Johnson*, 109 S. Ct. 2533, 2538 (1989), and *Taxpayers for Vincent*, 466 U.S. at 804.

As this Court has recently explained, a regulation is unrelated to the suppression of free expression and, thus, content neutral, so long as it is "*justified* without reference to the content of the regulated speech." *Ward*, 109 S. Ct. at 2754; *City of Renton v. Playtime Theatres, Inc.*, 475 U.S 41, 48 (1986) (emphasis in original). Such a regulation is deemed content neutral even if it has an incidental effect on some speakers or messages but not others. *Ward*, 109 S. Ct. at 2754.

Using the comparable time, place and manner standard, in *Renton* this Court upheld a zoning ordinance that prohibited adult movie theaters from locating within 1,000 feet of residential and certain other limited types of zones. The Court found that the ordinance was content neutral, since the ordinance, by its terms, was designed to protect the quality of neighborhoods. 475 U.S. at 48. The ordinance was aimed not at the content of the films but rather at the secondary effects of such theaters on the surrounding community. *Id.* at 47.

Likewise, in *Ward* this Court found constitutional a New York City guideline restricting sound amplification at concerts held in a public park. The city justified its guidelines as an effort to control noise levels in the surrounding area and to ensure the quality of sound at the concerts. 109 S. Ct. at 2754. This Court found that these objectives were content neutral. *Id.*

Like the regulations at issue in *Renton* and *Ward*, the local origination requirement at issue here is not related to the content of speech. Instead, as the courts below determined, this requirement serves several substantial purposes. Local origination provides an outlet for community self-expression, creates an opportunity for improved communications between residents of the City, and encourages localism, community pride, and cultural diversity. 879 F.2d at 1549-50; 678 F. Supp. at 745. These goals have nothing to do with the content of the programming, which the cable operator remains free to select.

In addition, the regulation at issue here is a very modest one, as the Seventh Circuit noted. 879 F.2d at 1550-51. Contrary to the petitioners' assertions, it does not divest them of editorial control or "artistic judgments" (Petition at 23): they remain free to select the programming they air. Like the FCC's local origination regulation at issue in *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972), the regulation here permits the cable operator to retain ultimate control over program selection. The requirement that 4½ hours of that programming, out of the hundreds of hours the petitioners offer on 60 different channels each week, be "geared to" their audience is neither onerous nor offensive. Because their audience is a diverse urban population with innumerable interests, the petitioners' programming options are likewise innumerable. While the regulation, because it touches on First

Amendment concerns, must be narrowly drawn, it need not be the least intrusive means of achieving the government's purpose. *See Ward v. Rock Agains Racism*, 109 S. Ct. at 2757-58; *United States v. Albertini*, 472 U.S. 675, 689 (1985). It is sufficient to show that the intrusion is incidental, as this small requirement surely is.

Thus, the analysis used by the courts below was an appropriate one. Whether formally analyzed under the rubric of *O'Brien*, or the similar time, place and manner test, the ordinance is properly evaluated by looking at the governmental interest at stake to determine how substantial it is, whether the regulation furthers that interest, whether that interest is unrelated to the suppression of free expression and whether the regulation is narrowly tailored to meet the desired ends.

The regulation at issue here does indeed further substantial govenmental interests with only minimal impact on First Amendment concerns, as the courts below held. This Court should therefore decline to review this case.

CONCLUSION

The decision below does not raise First Amendment concerns. Moreover, the Seventh Circuit's analysis of the City's local origination requirement was entirely appropriate and consistent with the reasoning of this Court and the decisions of other federal courts. Accordingly, review should not be granted.

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No. 89-747

Supreme Court, U.S.
FILED
JAN 9 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CHICAGO CABLE COMMUNICATIONS,
SOUTH CHICAGO CABLE, INC., and
CABLE OF CHICAGO, INC.,

Petitioners,

v.

CHICAGO CABLE COMMISSION, and
CITY OF CHICAGO,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITIONERS' JOINT REPLY BRIEF

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January 9, 1990

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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United States Constitution, Amendment [I]	*passim*

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* Decision below.

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PETITIONERS' JOINT REPLY BRIEF

The question here is whether the City of Chicago, whatever its goal, may constitutionally regulate programming distributed over cable television lines to prescribe subject-matter (even in terms of broad parameters) and to restrict its locale of production. Essential to resolution of this question, regardless of the magnitude of the speech-restriction, is agreement on the "standard of review" by which the regulation is to be evaluated in the context of the First Amendment. The courts below held that "standard" to be

the interest-balancing test of *United States* v. *O'Brien*.[1] The City now argues that the Seventh Circuit's treatment of the First Amendment question "is merely *dicta*" because the regulation and "the fines [imposed thereunder do] not implicate the First Amendment in any way". Opp. at 5. This argument is tacit admission by respondents that *O'Brien* is inapposite to review of regulations that facially and purposefully restrict the free exercise of communicative activity.

According to the City, the "local origination requirement at issue is not related to the content of speech" because it "provides an outlet for community self-expression, creates an opportunity for improved communications between residents of the City, and encourages localism, community pride, and cultural diversity . . . [,] goals hav[ing] nothing to do with the content of the programming . . .". Opp. at 9. It is the City's position that direct supervision of petitioners' programming is constitutionally permissible because the "requirement serves several substantial purposes." *Id.* Under this theory, government, provided *only* that its "purpose" is adjudged "substantial", is freed of First Amendment constraint and conceptually would be allowed to apply similar content-based restrictions to other local media, including newspapers and broadcast stations, as well as to "speakers" such as motion-picture theaters. For those vehicles of communication, like cable systems, similarly possess the capacity to "provide[ ] an outlet for community self-expression", to "create[ ] an opportunity for improved communications between resi-

[1] 391 U.S. 367 (1968).

dents of the City" and to "encourage localism, community pride and cultural diversity".

Under the City's First Amendment analysis, as well as that of the court below, local broadcast stations or newspapers may be required, at least to a "modest" or "small" degree, to "gear" the content of their communications to officially prescribed goals and to "produce" minimal portions of their communicative offerings within the City. Opp. at 9.[2] Constitutionally speaking, there is no distinction between the City's "L.O. regulation" as applied to petitioners' cable communications, and, for example, a requirement that *The Chicago Tribune* dedicate a few columns or pages "out of the hundreds" printed each week to promotion of City-sponsored goals, *id.*, or that it "produce" a prescribed "quota" of the publication's content "in the City of Chicago." Opp. at 4.[3] Faced once with essentially this same issue, this Court said:

> Even if a newspaper would face no additional costs to comply with a compulsory access law and would not be forced to forego publications of news

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[2] Like the courts below, the City persists here in the erroneous belief that an "incidental" restriction on speech within the context of *O'Brien* is one where the "intrusion" may be described as "small". Opp. at 10. *See* Petition at 12 n.15 and 14-16.

[3] Newspapers use public property in a variety of ways to distribute their product and frequently must negotiate with local government in such regard. Broadcast stations similarly must obtain local zoning clearances for transmitting towers, etc. Under the First Amendment theory espoused below, cities, provided only that their goals are deemed "substantial", might lawfully condition such authority on agreement by those media-interests to subject their *communicative activities* to a modicum of regulation.

> or opinion by inclusion of a reply, the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the functions of editors .... The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper ...—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how government regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.

Miami Herald Pub. Co. v. *Tornillo*, 418 U.S. 241, 258 (1974). Regulatory "goals", however lofty or ambitious, neither negate nor obviate the command of the First Amendment. *Id.* at 256 ("A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated").

Manifestly, a cable operator's choice of "programming" subject-matter, and the determination of where and by whom such communications are to be produced, "constitute the exercise of editorial control and judgment" protected by the First Amendment. That these underlying "editorial judgments" are made by a cable-television editor instead of by a newspaper editor is a "distinction" without First Amendment significance. Neither the Seventh Circuit nor the respondents here demonstrate "how government regulation of this crucial process" is rendered less inviolate under the Constitution because the medium of dissemination is that of the electronic press rather than the print model.[4]

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[4] The Seventh Circuit summarily concludes below that "[u]nlike

The instant case is totally unlike *Members of the City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U.S. 789 (1984), where the purpose of the regulation there at issue was to restrict "visual clutter" and thereby to control a "public nuisance", 466 U.S. at 809, goals *unrelated* to the communication and the communicative activity in question.[5] Here, in contrast, Chicago's L.O. regulation is not only aimed at the *origin* and *content* of the communications in question, it is the *communication* itself by which the City purports to further its stated goals. *See, e.g.*, 879 F.2d

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the traditional forms of print media a cable programmer enjoys a virtual monopoly over its area", and that this fact gives the City the right "to proffer some requirements guaranteeing that the cable customers are, to the extent possible, accorded a range of programming from the franchisee, since the cable viewing public has no other channel to which to turn". *Chicago Cable Communications* v. *Chicago Cable Commission*, 879 F.2d 1540, 1550 (1989), App. 18a-19a. This observation would seem to be offset, if not belied, by respondents' acknowledgment that petitioners' systems, in addition to their locally originated programming, offer their subscribers "hundreds of hours [of programming] on 60 different channels each week." Opp. at 9. The fact is that petitioners' cable services are *by far* the greatest contributor to video diversity in the Chicago market. That cable subscribers have access to a range of 60 channels of programming, while non-subscribers may access only a fraction of such services, is hardly reason or justification to compromise the First Amendment freedoms of the cable-television provider. *See Miami Herald Pub. Co.*, 418 U.S. at 249-254.

[5] Neither is this case similar to *Ward* v. *Rock Against Racism*, 109 S.Ct. 2746, 2754 (1989), another "nuisance" case where the sole purpose of the municipal regulation was "to control noise levels . . . and to avoid undue intrusion into residential areas", a form of restriction found there to "satisf[y] the requirement that time, place, or manner regulation be content-neutral". Chicago's L.O. regulation is far more than the reasonable supervision of the "time, place or manner" of petitionrs' speech.

at 1549-50, App. 16a-18a. Unlike *Taxpayers for Vincent*, where no party questioned the "constitutional power of the City to attempt to improve its appearance", 466 U.S. at 805, or *Rock Against Racism*, where "it can no longer be doubted that government 'ha[s] a substantial interest in protecting its citizens from unwelcome noise' ", 109 S.Ct. at 2765 (quoting *Taxpayers for Vincent*, 466 U.S. at 806), petitioners fundamentally contest the constitutional power of government facially to regulate their programming and to compromise the free exercise of their editorial discretion.[6]

When the issue is whether a particular regulation "abidg[es] the freedom of speech, or of the press", the decisions of this Court make plain that the pivotal determination is one of invoking the proper standard of review. If all that government requires in order to restrict the subject-matter and source of production of programming distributed via communications media is a simple interest-balancing test, and a determination that the avowed regulatory goals *outweigh* (and thus *override*) the First Amendment guarantees of a free press, then the courts below were correct in their disposition of this case. We respectfully urge, however, that the facts *sub judice* require application of

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[6] While regulations designed to achieve "noise abatement" or "clean cities" presumptively fall "within the constitutional power of the Government", *O'Brien*, 391 U.S. at 377, a governmental restriction *directly placed* on the exercise of petitioners' editorial discretion, whatever the regulator's "goal" or "substantiality of interest", does not, *O'Brien*, therefore is inapposite to review of the City's L.O. regulations. By applying *O'Brien*, the courts below deny petitioners the protection guaranteed by the First Amendment.

a more rigorous standard of First Amendment review than the "less demanding" evaluation contemplated by *O'Brien*, and that the subject petition should accordingly be granted to clarify this important, and frequently misunderstood, corner of constitutional law.

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